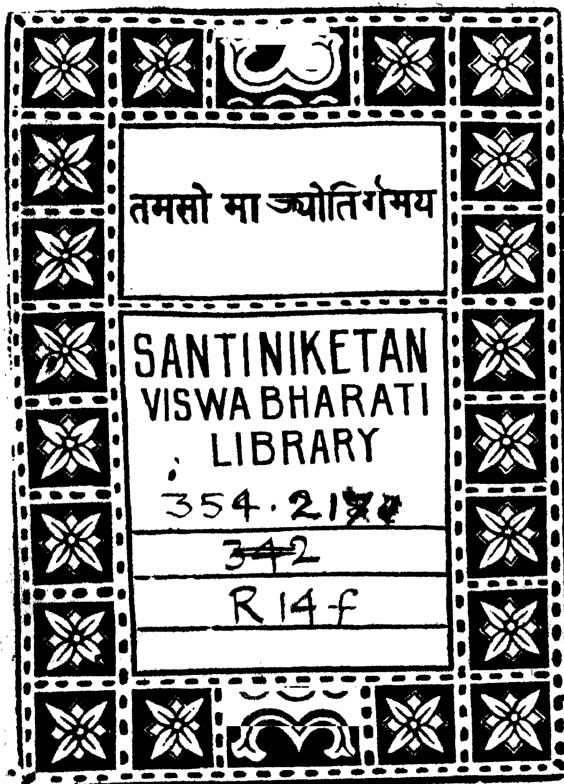

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FUNDAMENTAL RIGHTS

A constitutional and juridical study with particular reference to India in the light of the experience of the United States of America and the United Kingdom

BY

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WITH A FOREWORD BY

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First published December 1946

To

MY UNCLE

M. HIRIYANNA, M.A.

Formerly Professor of Sanskrit, Maharaja's College, Mysore

BY THE SAME AUTHOR

THE LAW OF THE INDIAN CONSTITUTION

FOREWORD BY PROFESSOR A. BERRIEDALE KEITH, D.C.L., LL.D.

Longmans, Green & Co., Ltd.

DISTRIBUTION OF LEGISLATIVE POWERS IN THE FUTURE INDIAN FEDERATION

FOREWORD BY THE RIGHT HON'BLE VISCOUNT SANKEY, D.C.L., LL.D.

Longmans, Green & Co., Ltd.

FOREWORD

It gives me great pleasure to contribute a Foreword to this essay. The subject of Fundamental Rights has become one of immediate practical importance; and those on whom the responsibility rests of devising the new Indian Constitution will find the materials collected in this volume of equal value and interest. The authorities cited by Mr. Ramaswamy are for the most part, as one would expect, from American sources; and he has done well to reproduce in full the relevant portions of the judgements themselves.

The Report of the Joint Select Committee in 1934, on which the Government of India Act, 1935, was based, quoted the following passage from the Report of the Simon Commission with reference to the subject of Fundamental Rights: 'We are aware that such provisions have been inserted in many constitutions, notably in those of the European States formed after the war. Their appearance, however, has not shown them to be of any great practical value. Abstract declarations are useless unless there exist the will and the means to make them effective.'

The Select Committee agreed with these observations and added: 'A cynic might indeed find plausible arguments, in the history during the last ten years of more than one country, for asserting that the most effective method of ensuring the destruction of a fundamental right is to include a declaration of its existence in a constitutional instrument'. They then proceeded to state what appeared to them to be practical arguments against the inclusion of any declaration of the kind, which, they observed, might be put in the form of a dilemma: 'for, either the declaration of rights is of so abstract a nature that it has no legal effect of any kind, or its legal effect will be to impose an embarrassing restriction on the powers of the Legislature and to create a grave risk that a large number of laws may be declared invalid by the Courts because inconsistent with one or other of the rights so declared'. Mr. Ramaswamy is not unaware of the latter danger; but the fundamental rights which he suggests might find a place in any future Indian Constitution are sufficiently restricted in

number to make the risk negligible. He very wisely bases his suggestions on that great instrument, the Constitution of the United States of America; but he is not prepared to follow blindly even that precedent. It is possible that both the Simon Commission and the Joint Select Committee, if they had paid greater attention to the American authorities, might themselves have arrived at conclusions different from those which they embodied in their Reports; and it is not the least valuable part of Mr. Ramaswamy's work that he has been able to show from the American reports that the fundamental rights conferred upon American citizens by the Constitution of the United States are real and effective, constantly enforced and readily enforceable. They are few in number, but they protect all the vital interests of human personality; and there seems no practical reason why provisions on similar lines should not be embodied, to the great advantage not only of minorities, in an Indian Constitution.

It will, I think, be a matter of surprise to those unacquainted with the American cases to see how far the very broad and general language of the American Constitution has been extended by the courts to protect the rights which the Constitution gives; how reasonably on the whole the courts have interpreted the language of the Constitution; and, not least, how consonant with justice and commonsense the general result of the decisions appears to be. Mr. Ramaswamy's conclusions will not always escape criticism. Many, for example, will dissent from his view that the right of property should not be regarded as a fundamental right, though it is not for the writer of this Foreword to express an opinion one way or the other. I may be forgiven, however, for expressing a doubt whether domicile could ever be a satisfactory basis of citizenship in the case of the federal units, as Mr. Ramaswamy proposes. But this is not a matter of the first importance.

I very cordially commend this book to the sympathetic attention of all those who are interested in the preparation of the new constitutional instrument under which a greater number of human beings than ever before in the world's history are to be united in one polity, with the full intention,

under the providence of Almighty God, of living in peace and harmony with one another and with all the other peoples of the earth.

MAURICE GWYER

Delhi University,
Delhi, July 1946

PREFACE

The fascist philosophy of some countries, which exalted the State at the expense of the individual and made him just a cog in a gigantic and powerful machine for the enslavement of other countries and their imperialistic exploitation, has brought during recent years misery and destruction on a scale unknown in human annals. It would be a tragedy of the first magnitude if the lessons of the recent past are lost upon the present generation of mankind. The mere destruction of the fascist States is not going to ensure a peaceful world order in the critical years ahead. This is not the place, however, to dilate upon the conditions requisite for the establishment of peace in the world. But the keystone of the arch for a stable world order must be the provision made for securing the freedom of the individual. Liberty is not a mere decorative frill which lends a certain grace and charm to human existence but it is of the very essence of life itself.

The fathers of the American Constitution inspired by rare vision wrote into their Constitution a Bill of Human Rights, placing them beyond the reach of legislative majorities and panoplied officials. They cried a halt to the power of the State to encroach upon the domain of human liberties by decreeing that the State shall go only thus far and no farther. The pages of the book which follow show how the American Bill of Rights, reinforced by later additions, has, with the wise and powerful support of the judiciary, been able to establish and foster a high and priceless tradition of liberty and free institutions in the United States of America.

An endeavour has been made in this book to study how the problem of human liberties is approached in the constitutional systems of the United States and the United Kingdom and what lessons the experience of these two great champions of individual liberty has for us in India. This study has convinced me that we in India would do well to have a code of fundamental rights written into our future Constitution as a safeguard against Federal as well as State governmental interference with those basic human rights the preservation of which is the indispensable condition of a free society. My

study of this subject does not stop, however, with the mere conclusion that a Bill of Rights is desirable for India. I have also drafted a code of provisions which, in my view, ought to be written into the new Constitution of India. I have also explained at length why those provisions have been put into my draft bill and how they are likely to work in practice.

It is my earnest hope that the present study, though primarily undertaken in the interests of India, will make an appeal far beyond its confines. For, the problem of safeguards for the basic human rights is after all a general human problem, which transcends all limitations of race, religion and territory. I would fain hope that ere long every country in the world, recognizing the place of human rights in an enlightened system of government, will have written into its constitution, a code of fundamental rights comprising precise limitations—not mere precepts or pious aspirations—upon the powers of government and capable of being enforced by the judiciary. And in the meantime I can only echo the fine sentiment which that great American Benjamin Franklin gave expression to in one of his last letters: 'God grant that not only the love of liberty, but a thorough knowledge of the rights of man may pervade all nations of the earth, so that a philosopher may set his foot anywhere on its surface and say, "This is my Country".'

The Charter of the United Nations recently drawn up at San Francisco and subscribed to by no less than fifty-one nations affirms the faith of the peoples of those nations in fundamental human rights and in the dignity and worth of the human person. Article 13 (1) of that charter provides that the General Assembly shall initiate studies and make recommendations for the purpose, among others, of 'assisting in the realization of human freedoms for all without distinction as to race, sex, language, or religion.' And under Article 55 (c) of the Charter, the United Nations are called upon to promote universal respect for, and observance of, human rights and fundamental freedoms. The authors of that great Charter are fully conscious of the fact that it will not do merely to affirm one's faith in the value of human freedoms but that active steps should also be taken to assist in the *realization* of those

freedoms in the context of everyday life. The question arises as to how these freedoms can be realized in the dynamic conditions of society. It is my earnest hope that the study which I have undertaken in the pages of this volume will make some contribution to a satisfactory solution of this problem.

The draft Bill of Rights which I have drawn up for India can, I believe, with but few modifications be easily adapted to serve the needs of most federal States. This Bill, with suitable modifications, would, I think, also be found useful by States working under unitary forms of government.

I wish to express my deep sense of gratitude to Sir Maurice Gwyer for his kindness in contributing a foreword for this book.

I am grateful to the Indian Council of World Affairs, Delhi, for publishing this volume as one of its monographs. To the secretary of the organization, Dr. A. Appadorai, I owe a special debt of gratitude for the kindly and helpful interest which he has evinced in this work.

M. RAMASWAMY

Basavangudi,
Bangalore City,
5 October, 1946

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THE CASE FOR A CONSTITUTIONAL BILL OF RIGHTS

I

INTRODUCTORY

The problem of providing safeguards for fundamental rights in the future constitution of India requires careful consideration. It inevitably raises a host of questions, the answers to which are by no means easy : i. Is it necessary to incorporate a bill of fundamental rights at all in the constitution, and, if necessary, should it consist of mere precepts and not guarantees enforceable in courts of law, or should it take the form of definite mandates and restrictions which the courts would, in case of their infraction, be competent to enforce ? ii. If it is to be of the latter category, is it sufficient if it contains limitations upon the powers of the Federal government only, or should it also comprise restrictions upon the powers of a State government ? iii. If the bill of rights is to operate on one or both these governments, what are the fundamental rights which require to be safeguarded? iv. And, finally, what is the precise form which these rights should assume, so that, while the bill of rights might help to secure to the citizen the substance of liberty, it will not, at the same time, unduly hamper the governments concerned in shaping their policies and actions in the interests of the well-being of their peoples, under the changing matrix of social and economic forces ? These are difficult questions to answer and only if we are able to answer them satisfactorily will a proper solution for the problem we have set about to investigate be found.

In England there is nothing like a code of fundamental rights, kept beyond the reach of the legislative processes of Parliament, which the citizen can invoke for protecting his basic rights. In that country the liberties of the subject rest on the principle that a person may do or say anything so long as what he does or says does not violate any rule of law, whether derived from a statute or recognized as forming a

part of the common law. So that, the ambit of personal liberty in England must be expressed in terms of what remains after making due allowance for restrictions imposed by law. To use the language of Lord Wright in *Liversidge* v. *Sir John Anderson*[1] the liberty of a subject in England is 'a liberty confined and controlled by law, whether common law or statute'.

Nothing is more characteristic of English Jurisprudence than the notion that the English Parliament is supreme. It follows as a corollary from this principle that the judiciary can only apply the law as formulated by Parliament and cannot challenge its validity on the ground of its being arbitrary or unreasonable. As Lord Shaw of Dunfermline has put it:

> The corrective of the action of Parliament as a human and fallible institution is not a legal corrective, lies not with the judiciary but lies with Parliament itself, acted upon by a fresh wave of public opinion, a higher sense of duty, a wider range of experience or a broader perspective in the regions of applied justice.[2]

The English Parliament, if it is so minded, can pass laws curtailing the basic liberties of the subject in the most arbitrary fashion and yet no court of law in England can contest its authority to pass such enactments.[3] The safeguards for English liberty against parliamentary tyranny lie in the innate good sense of the English people and in the force of public opinion manifesting itself through an independent press and a vigilant parliamentary opposition. As Lord Wright has observed in *Liversidge* v. *Sir John Anderson*:[4]

> But in the constitution of this country there are no guaranteed or absolute rights. The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved.

1. (1942) A.C. 206, p. 260.
2. Lord Shaw, *American Law Review*, April 1911, Vol. 45, p. 275, note 'where the Legislature is Free and the Judiciary is Bound' cited in Haines, *The American Doctrine of Judicial Supremacy*, p. 2 (1914).
3. *Rex* v. *Halliday* (1917) A.C. 260.
4. (1942) A.C. 206, p. 261.

The fathers of the American Constitution were unwilling to entrust the fate of civil liberties to an omnipotent legislature, even though that legislature was constituted wholly of popular representatives. The majority in a legislature may well, they thought, in the heat of excitement or by yielding to passion, enact laws which would injure the most cherished rights of the minorities, unless their powers were carefully circumscribed. As President William H. Taft has observed:

> No honest, clear-headed man, however great a lover of popular government can deny that the unbridled expression of the majority of a community converted hastily into law or action would sometimes make a government tyrannical or cruel. Constitutions are checks upon the hasty action of the majority. They are the self-imposed restraints of a whole people upon a majority of them to secure sober action and a respect for the rights of the minority........In order to maintain the rights of the minority and the individual and to preserve our constitutional balance, we must have judges with courage to decide against the majority when justice and law require.[5]

The framers of the American constitution proceeded on the theory that the elementary rights of an individual such as his right to life, liberty and property, to free speech and freedom to worship his maker according to the dictates of his conscience, should not be drawn into the vortex of political controversy and be placed at the mercy of majorities and that those rights should be definitely recognized in the constitution and protected in the case of invasion by a governmental authority by the courts of the land. As Mr. Justice Jackson in his opinion for the Supreme Court in the recent case of *Board of Education* v. *Barnette*[6] has observed (p. 638) :

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, and a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

5. President Taft, Special Message to Congress, 15 Aug, 1911, Cited in A. B. Hall, *Popular Government*, pp. 170-171.
6. (1943) 319 U.S. 624.

When the constitution of the United States emerged from the Constitutional Convention of 1787, it no doubt contained a few provisions touching the domain of individual liberty, but there was a wide-spread feeling that these were insufficient and required to be strengthened by a full-blown bill of rights in order to assure the people that the powers of the new Federal government would not be used in a manner detrimental to their liberties. Thomas Jefferson was in Paris when the Constitutional Convention was at work in Philadelphia. In December 1787 Jefferson wrote to Madison according his general approval to the Constitution but regretting the omission of a bill of rights. He wanted a declaration of fundamental rights 'providing clearly and without sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trial by jury in all matters of fact triable by laws of the land and not by the law of nations.'[7] When the first Congress met under the new Constitution, Madison introduced twelve amendments to the Constitution for the purpose of removing the apprehensions widely entertained regarding the rights of the people under the new constitutional dispensation. In introducing a series of propositions in the form of twelve amendments on 8 June 1789, Madison observed:

It appears to me that this House is bound, by every motive of prudence, not to let their first session pass over, without proposing to the State legislatures something to be incorporated into the Constitution, that will render it as acceptable to the whole people of the United States as it has been found to be to a majority of them. It will be desirable to extinguish from the bosom of the community any apprehensions, that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and freely bled. And if there are amendments desired of such a nature as will not injure the Constitution, and they can be engrafted so as to give satisfaction to the doubting part of our fellow citizens, the friends of the Federal government, by yielding them, will evince that spirit of

7. *Doct. Hist. Const.*, Vol. IV, p. 412: Cited in Charles E. Hughes, *The Supreme Court of the United States*, p. 157.

deference and concession for which they have been hitherto distinguished.[8]

As Mr. Rives in referring to Madison's amendments has put it:

The amendments proposed by Mr. Madison were, therefore, mainly in the nature of a Declaration of Rights, placing the freedom of speech, the freedom of the press, freedom of religion, the security of property, personal liberty, trial by jury, and in general every right and power of the people not delegated or surrendered, under the aegis of the Constitution, and by an express interdiction, beyond the reach of the Government.[9]

The amendments finally agreed to by Congress were twelve in number. And of these, ten were approved by the necessary number of States and became part of the Constitution on 15 December 1791. The first ten amendments are generally referred to as the American Bill of Rights. The Fourteenth Amendment which contains the valuable due process and equal protection of laws clauses operating as restraints on the powers of the States came into the Constitution in 1868, immediately after the Civil War.

I regard the American experiment of securing the fundamental decencies of human life by the incorporation of definite limitations on the powers of government capable of enforcement by the judiciary as one of the most significant contributions to the science of government. To an English lawyer who has to take the supremacy of the English Parliament as an established fact, there is no question of getting behind the laws enacted by Parliament, however unreasonable they may be. There are no external checks to the exercise by Parliament of its own powers. But to an American lawyer, who lives under a constitutional system which imposes restrictions upon the powers of the Federal and State legislatures, the notion that Federal and State laws which transgress constitutional restrictions are not laws but only masquerade as such is a

8. Cited by Taylor, *The Origin and Growth of the American Constitution*, p. 228.

9. Rives, *The Life and Times of James Madison*, ii, 38-46, cited by Taylor, *The Origin and Growth of the American Constitution*, p. 228.

familiar one. And in the field of basic liberties, many examples could be given of laws, Federal and State, which the courts have refused to enforce as colliding with one or other of the limitations imposed by the Constitution. Mr. Justice Matthews in his opinion for the Supreme Court in the leading case of *Hurtado* v. *California*[10] has put the legal position of laws transgressing constitutional restrictions, particularly the due process clause of the Fourteenth Amendment, very lucidly in these words:

> But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgement only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgements, and acts directly transferring one man's estate to another, legislative judgements and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the person and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government.

The experience of the United States in working a Constitution which contains guarantees for fundamental rights may be summed up in the form of three propositions: (1)

10. (1884) 110 U.S. 516.

Where concrete and justiciable issues can be raised before judicial tribunals in cases involving basic civil liberties, they are able to give invaluable help. (2) There are areas of civil liberty where the courts can either not function at all, or even if able to function, the help rendered can only be tardy or ineffective. (3) That the people who wish to preserve a high standard of liberty can never afford to relax their vigilance to prevent the arbitrary exercise of power. In other words, court help can only be a supplement to but cannot replace self-help. These propositions will be discussed and illustrated with reference to United States examples in the paragraphs that follow.

II

CONSTITUTIONAL SAFEGUARDS IN THE UNITED STATES FOR ASSURING A FAIR TRIAL TO AN ACCUSED PERSON

The framers of the Constitution of the United States were so anxious to provide the necessary guarantees for a fair trial to a person prosecuted on a criminal charge that they made provision for specific safeguards in the Sixth Amendment to the Constitution. That article reads as follows:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence.

It must be mentioned that this provision binds only the Federal government and not the States. Although the Constitution does not contain any specific parallel provision binding the States in this matter, and although the subject matter of ordinary criminal law and procedure lies within the field of the residuary authority of the States, the courts by their interpretation of the due process clause of the Fourteenth Amendment which prevents a State from depriving any person of his life, liberty or property without due process of law, have given invaluable protection to persons prosecuted by the States to have every chance of having a fair trial. And when

the State courts have denied to any accused the essential elements of a fair and impartial trial, the Supreme Court, on many occasions, has given relief when its aid has been invoked under the Fourteenth Amendment. I shall give here a few instances in which that great tribunal has intervened in such cases.

(*a*) *Powell* v. *Alabama.* The case of *Powell* v. *Alabama*[11] arose out of the conviction in Alabama of certain negroes upon a charge of having committed rape on the persons of two white girls. They had been sentenced to death by the trial court and the sentence had been confirmed by the Supreme Court of Alabama. The accused appealed against their conviction to the Supreme Court of the United States on the ground that they had been denied due process of law and the equal protection of laws contrary to the Fourteenth Amendment. Two of the main grounds of attack were : (1) they were not given a fair, impartial, and deliberate trial, and (2) they were denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial. The court set aside the conviction and remanded the case holding that the whole trial was vitiated by the fact that the accused had not been given reasonable opportunity to engage and be defended by counsel of their own choice.

The accused were young, illiterate, negro boys. The offence was said to have been committed on a freight train while it was passing through Alabama. They were tried at the county seat of Scottsboro in Alabama. The accused were residents of other States where alone members of their families and friends resided. The record showed that no opportunity was given to the accused to secure counsel of their own choice. Until the date of the trial, no counsel had been fixed with the responsibility to conduct the case. At the suggestion of the trial judge who had asked the members of the bar generally to help the accused in their defence, a kind of pro forma appearance for the accused was entered by a lawyer called Mr. Moody. Even he came into the case

11. (1932) 287 U.S. 45.

only on the morning of the trial without any preparation. Mr. Justice Sutherland delivering the opinion of the Court held that the facts of the case made it clear that the accused had been denied the effective assistance of counsel and consequently the trial was vitiated. He observed as follows (pp. 52-58) :

However guilty defendants, upon due inquiry, might prove to have been, they were, until convicted, presumed to be innocent. It was the duty of the court having their cases in charge to see that they were denied no necessary incident of a fair trial. With any error of the State court involving alleged contravention of the State statutes or Constitution, we, of course, have nothing to do. The sole inquiry which we are permitted to make is whether the federal constitution was contravened........; and as to that, we confine ourselves, as already suggested to the inquiry whether the defendants were in substance denied the right of counsel, and if so, whether such denial infringes the due process clause of the Fourteenth Amendment. First. The record shows that immediately upon the return of the indictment defendants were arraigned and pleaded not guilty. Apparently they were not asked whether they had, or were able to employ, counsel, or wished to have counsel appointed; or whether they had friends or relatives who might assist in that regard if communicated with. That it would not have been an idle ceremony to have given the defendants reasonable opportunity to communicate with their families and endeavour to obtain counsel is demonstrated by the fact that very soon after conviction, able counsel appeared on their behalf........It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice. Not only was that not done here, but such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. ......It will thus be seen that until the very morning of the trial no lawyer had been named or definitely designated to represent the defendants...... The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them. It is not enough to assume that counsel thus precipitated into the case thought there was no defence, and exercised their best judgement in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial. Chief Justice

Anderson, after disclaiming any intention to criticize harshly counsel who attempted to represent defendants at the trials, said: '........The record indicates that the appearance was rather pro forma than zealous and active........' Under the circumstances disclosed, we hold that the defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities.

Dealing with the point whether the denial of the assistance of counsel in the circumstances of the case contravened the due process clause of the Fourteenth Amendment, Mr. Justice Sutherland observed (pp. 71-72) :

In the light of the facts outlined in the forepart of this opinion—the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process. But passing that, and assuming their inability, even if opportunity had been given, to employ counsel, as the trial court evidently did assume, we are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we may now decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defence because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of a free government which no member of the Union may disregard.' *Holden* v *Hardy, supra.* In a case such as this, whatever may be the rule in other cases, the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel.........

It has also been held that if the trial is dominated by a mob and the members of the jury have had no chance of

exercising their independent judgement, the conviction of an accused, under such circumstances, involving either death penalty or imprisonment, deprives the accused of his life or liberty without due process of law.

(b) *Moore* v. *Dempsey.* In *Moore* v. *Dempsey*,[12] five negroes had been convicted of murder of a white man by name Clinton Lee and had been sentenced to death by a court in Arkansas. The condemned persons applied to the District Court of the United States for the Eastern District of Arkansas for a writ of habeas corpus to secure their release on the ground that the proceedings in the State court 'although a trial in form, were only a form, and that the appellants were hurried to conviction under the pressure of a mob, without any regard to their rights, and without according to them due process of law.' The District Court dismissed the application for a writ but certified that there was a probable cause for allowing the appeal. An appeal was then preferred by the condemned negroes to the Supreme Court of the United States.

The facts leading up to the case may be briefly noticed. On the night of 30 November 1919, a number of coloured people, who had assembled in a church to take steps to engage counsel for protection against extortions alleged to have been practised upon them by white landlords, were attacked and fired upon by a crowd of white persons. In the disturbance that followed the firing, a white man was killed. The killing of a white man caused great public excitement among the white population, a section of which attacked and killed a number of negroes. In the course of these attacks, a white man by name Clinton Lee was killed and the five negroes in the case had been indicted upon a charge of having murdered that white man. As to the atmosphere in which the trial was conducted, I give here an extract from the opinion delivered by Mr. Justice Holmes for the Supreme Court which runs thus (pp. 89-90) :

12. (1923) 261 U.S. 86.

On 3 November the petitioners were brought into court, informed that a certain lawyer was appointed their counsel, and were placed on trial before a white jury,—blacks being systematically excluded from both grand and petit juries. The court and neighbourhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result. The counsel did not venture to demand delay or a change of venue, to challenge a juryman, or to ask for separate trials. He had had no preliminary consultation with the accused, called no witnesses for the defence, although they could have been produced, and did not put the defendants on the stand. The trial lasted about three quarters of an hour, and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree. According to the allegations and affidavits there never was a chance for the petitioners to be acquitted; no juryman could have voted for an acquittal and continued to live in Phillips county, and if any prisoner, by any chance, had been acquitted by a jury, he could not have escaped the mob.

The Supreme Court held that the trial dominated as it was by a mob was vitiated as there was an actual interference with the course of justice infringing the constitutional right of an accused not to be deprived of his life or liberty without due process of law under the Fourteenth Amendment. Mr. Justice Holmes delivering the opinion of the Supreme Court observed (p. 91) :

It certainly is true that mere mistakes of law in the course of a trial are not to be corrected in that way. But if the case is that the whole proceeding is a mask,—that counsel, jury, and judge were swept to the fatal end by an irresistible wave of public passion, and that the courts failed to correct the wrong,—neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this court from securing to the petitioners their constitutional rights.

(c) *Brown* v. *Mississippi*. In *Brown* v. *Mississippi*[13] the Supreme Court set aside the conviction of three persons who had been sentenced to death, as it transpired that, aside from the confessions which were shown to have been extorted by officers of the State by brutality and violence there was no

13. (1936) 297 U.S. 278.

independent evidence sufficient to warrant the submission of the case to the jury. The court held that convictions based solely on extorted confessions were inconsistent with the due process of law required by the Fourteenth Amendment of the Constitution. The accused after their conviction by the trial court had appealed to the Supreme Court of the State contending, inter alia, that the confessions upon which the conviction was rested had been procured by physical torture. The state Supreme Court by a majority refused to interfere. The accused thereupon carried the matter to the Supreme Court of the United States contending that their constitutional right under the Fourteenth Amendment had been infringed. Mr. Chief Justice Hughes in delivering the opinion of the court setting aside the conviction observed (pp. 285-287) as follows:

The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental'. *Snyder* v *Massachusetts, supra; Rogers* v *Peck,* 199 U.S. 425, 434. The State may abolish trial by jury. It may dispense with indictment by a grand jury and substitute complaint or information. *Walker* v *Sauvinet,* 92 U.S. 90; *Hurtado* v *California,* 110 U.S. 516, *Snyder* v. *Massachusetts, supra.* But the freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. The state may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying a corrective process. *Moore* v *Dempsey,* 261 U.S. 86, 91. The State may not deny to the accused the aid of counsel. *Powell* v. *Alabama,* 287 U.S. 45. Nor may a State, through the action of its officers, contrive a conviction through the pretence of a trial which in truth is 'but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.' *Mooney* v. *Holohan,* 294 U.S. 103, 112. And the trial equally is a mere pretence where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires, 'that State action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'. *Herbert* v. *Louisiana,* 272 U.S. 312, 316. It would be difficult to conceive of

methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process ...... In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in an appropriate manner. *Mooney* v. *Holohan, supra.* It was challenged before the Supreme Court of the State by the express invocation of the Fourteenth Amendment. That Court entertained the challenge, considered the federal question thus presented, but declined to enforce petitioners' constitutional right. The court thus denied a federal right fully established and specially set up and claimed and the judgement must be reversed.

It must be pointed out at this stage that the legislative and administrative jurisdiction over ordinary criminal justice in the United States comes within the ambit of State authority. The Federal government of the United States is not invested with power over ordinary criminal law and procedure. The Constitution in fact has conferred upon the Federal government power over three species of crimes only, namely, treason,[14] the counterfeiting of the securities and current coin of the United States,[15] and the definition and punishment of piracies and felonies committed on the high seas and offences against the law of nations.[16] Of course, Congress is competent to create under appropriate laws, as ancillary to the exercise of its power over its enumerated subjects, particular offences and annex suitable penalties for their commission. Instances of such exercise of Federal power are quite common. For example under its Commerce Power, Congress has enacted the National Motor Theft Act, 1919, making the transportation in inter-state commerce of motor vehicles which are known to have been stolen criminally punishable.[17] As the adminis-

14. Article III, Section 3.
15. Article I, Section 8, Clause 6.
16. Article I, Section 8, Clause 10.
17. *Brooks* v. *United States* (1925) 267 U.S. 432.

tration of ordinary criminal justice is a matter falling within the residual authority of the States, the Federal courts will not interfere in its administration unless a constitutional right is directly involved. The Supreme Court of the United States has held that although a State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, there are certain fundamental decencies which the courts must observe when a person's life or liberty is in jeopardy. And as we have seen, the Supreme Court has held that, where, for instance, an accused has been deprived of the assistance of counsel, or has been hurried to his conviction under mob domination, or convicted solely on the strength of an extorted confession or upon testimony known to the prosecution to be perjured, he is deprived of his life or liberty without due process of law under the Fourteenth Amendment and has interfered to set matters right when its jurisdiction has been invoked. The Supreme Court interferes in such cases not because that court has any general appellate jurisdiction over criminal trials proceeding in State courts but because a constitutional right has been infringed.

III

Constitutional safeguards for liberty in its varied phases in the United States

Under the due process clauses of the Fifth and Fourteenth Amendments neither the Federal government nor the States can deprive any person of his life, liberty or property without due process of law. I am devoting the second chapter to a study of these important clauses in the Constitution of the United States. I shall in this context give the reader a general idea as to how the courts have helped to safeguard the liberty of individuals—liberty in its varied phases—by exercising their power of judicial review.

The Supreme Court has given a wide connotation to the word liberty which occurs in the Fourteenth Amendment to

the Constitution. As Mr. Justice McReynolds in delivering the opinion of the court in *Meyer* v. *Nebraska*[18] has put it:

> While this court has not attempted to define with exactness the liberty thus guaranteed [under the Fourteenth Amendment], the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Although the liberty secured under the Fourteenth Amendment is not absolute and is subject to control by a State in the larger interests of the community, it is ultimately for the courts to determine whether the curtailment effected by the State under its police power is reasonable and appropriate. As Mr. Justice McReynolds in *Meyer* v. *Nebraska*[19] has put it:

> The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts. *Lawton* v *Steel,* 152 U.S. 133, 137.

(*a*) *Meyer* v. *Nebraska.* The case of *Meyer* v. *Nebraska*[20] arose out of the following facts. The plaintiff in error, Meyer, had been tried and convicted in the district court for Hamilton county, Nebraska, upon the charge that on 25 May 1920, while employed as an instructor in Zion Parochial School, he had unlawfully taught the subject of reading in the German language to Raymond Parpart, a child aged ten years, who had not passed the eighth grade, contrary to the terms of a Nebraska statute of 1919. Section 1 of that enactment was

18. (1923) 262 U.S. 390, p. 399.
19. (1923) 262 U.S. 390, pp. 399-400.
20. (1923) 262 U.S. 390.

as follows: 'No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language.' Section 2 ran thus: 'Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county Superintendent of the county in which the child resides.' Persons contravening the provisions of the statute were under section 3 of it deemed guilty of a misdemeanour and were subject to fine or imprisonment prescribed therein. The plaintiff in error having been convicted by the Nebraska court aforesaid appealed to the State Supreme Court. That court upheld the conviction holding that the offence charged and proved was 'the direct and intentional teaching of the German language as a distinct subject to a child who had not passed the eighth grade' in the parochial school aforesaid, a collection of biblical stories being used. That Court also ruled that the statute did not constitute a violation of the Fourteenth Amendment but was a valid exercise of the police power of the State. Thereupon he sued out a writ of error from the Supreme Court of the United States.

The main contention urged on behalf of the plaintiff in error, Meyer, was that the statute, as construed and applied, unreasonably infringed the liberty guaranteed to him by the Fourteenth Amendment as, under that provision, no State could deprive any person of life, liberty, or property without due process of law.

It was argued for the State of Nebraska that the purpose of the legislation was a commendable one as by inhibiting training and education of the immature in foreign tongues and ideals when they were young and impressionable, the English language would become the mother tongue of the children of the large foreign born element in the State population and American ideals and unity would be promoted thereby. It was contended that a piece of legislation with such an object was a valid exercise of the State police power and was not an infringement of the Fourteenth Amendment.

Mr. Justice McReynolds speaking for the Supreme Court in holding that the statute as applied was arbitrary and without reasonable relation to any end within the competency of the State observed as follows (pp. 400-403) :

The American people have always regarded education and acquisition of knowledge as matters of supreme importance, which should be diligently promoted. The ordinance of 1787 declares: 'Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged'. Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws. Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honourable,—essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment. The challenged statute forbids the teaching in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. The Supreme Court of the State has held that 'the so-called ancient or dead languages' are not 'within the spirit or the purpose of the act'. *Nebraska Dist.* v. *McKelvie,* 108 Neb, 448, 187 N.W. 927. Latin, Greek, Hebrew are not proscribed; but German, French, Spanish, Italian and every other alien speech are within the ban. Evidently the legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own. It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals; and 'that the English language should be and become the mother tongue of all childen reared in this State'. It is also affirmed that the foreign-born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type, and that the public safety is imperilled. That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights

which must be respected. The protection of the Constitution extends to all,—to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution,—a desirable end cannot be promoted by prohibited means ...... The desire of the legislature to foster a homogeneous people with American ideals, prepared readily to understand current discussions of civic matters, is easy to appreciate. Unfortunate experiences during the late war, and aversion toward every characteristic of truculent adversaries, were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the State and conflict with rights assured to plaintiff in error. The interference is plain enough, and no adequate reason therefor in time of peace and domestic tranquillity has been shown. The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the State's power to prescribe a curriculum for institutions which it supports .... No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State.

(*b*) *Pierce* v. *Society of Sisters.* In the case of *Pierce* v. *Society of Sisters*,[21] the Supreme Court condemned as contravening the Fourteenth Amendment an Oregon statute called the Compulsory Education Act, 1922, by which every parent, guardian or other person having control or charge or custody of a child between the ages of eight and sixteen, with certain exceptions, to be sent only to 'public schools', failure to do so being a misdemeanour and punishable as such. A Catholic Society which was running primary schools in Oregon for many years sought an injunction against the enforcement of the statute. The Supreme Court in holding the statute to be a contravention of the due process clause of the Fourteenth Amendment pointed out that a State could not, consistently with the liberty of parents and guardians to direct the up-

21. (1925) 268 U.S. 510.

bringing and education of the children under their control, compel them to have the children educated only in public schools under a standardized pattern of instruction. As. Mr. Justice McReynolds in delivering the opinion of the Court observed (pp. 534-535) :

> Under the doctrine of *Meyer* v *Nebraska,* 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

The *Nebraska* and *Oregon* cases hereinbefore considered establish the principle that parents and guardians must be allowed considerable latitude in the upbringing and education of their children and wards. The States are undoubtedly competent to make reasonable regulations for the supervision and control of education and educational establishments in their territories. Those regulations may, for instance, require that all children of proper age shall attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught.[22] But the exercise of State authority in the field of education is not without its limits. One of them being that a State may not compel parents to send their children only to public schools when they would prefer to have them educated at private institutions for good reasons of their own.

22. See the observations of Mr. Justice McReynolds in *Pierce* v. *Society of Sisters* (1925) 268 U.S. 510, p. 534.

IV

THE CONSTITUTIONAL PROTECTION OF EQUAL LAWS IN THE UNITED STATES

The equal protection of the laws clause of the Fourteenth Amendment to the United States Constitution by which no State shall deny to any person within its jurisdiction the equal protection of the laws is one of the most widely invoked provisions for preventing the enforcement of discriminatory measures. The whole system of administration of law and justice is, by this provision, made to rest upon the basis that all men are equal before the law and that distinction between man and man in the application of the laws will not be tolerated. As Mr. Chief Justice Taft in his opinion for the Court in the case of *Truax* v *Corrigan*[23] has observed:

> Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law', 'This is a government of laws and not of men', 'No man is above the law;' are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute, and apply laws. But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guarantee. The guarantee was aimed at undue favour and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process .... Thus, the guarantee was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favour of, or the deprivation of right permitted worked against, a larger class........

Yick Wo v *Hopkins*. I shall in this context discuss the facts of one important case *Yick Wo* v *Hopkins*[24] in order to

23. (1921) 257 U.S. 312, pp. 332-333.
24. (1886) 118 U.S. 356.

show how valuable is the protection offered by the equal protection of laws clause in countering discriminatory measures. More cases of this nature will be considered in the fourth chapter in connexion with the draft provision embodying the equal protection of laws clause which I have suggested as suitable for incorporation in the future Indian Constitution.

The well-known case of *Yick Wo* v *Hopkins*[25] arose out of the following facts. The plaintiff in error, Yick Wo, on 24 August, 1885, petitioned to the Supreme Court of California for a writ of habeas corpus, alleging that he was being illegally detained by the defendant Hopkins, the Sheriff of the City and County of San Francisco. The Sheriff made return to the writ that the petitioner was being held in custody by virtue of the sentence passed by a Police Judge's Court for having violated an ordinance promulgated by the Board of Supervisors of the City and County of San Francisco, by which it was made unlawful for any person or persons 'to establish, maintain, or carry on a laundry within the corporate limits of the City and County of San Francisco, without having first obtained the consent of the Board of Supervisors, except the same be located in a building constructed either of brick or stone'. The Supreme Court of California having discharged the writ, and an appeal preferred to the Circuit Court of the United States for the District of California having also proved unsuccessful, the plaintiff took his case before the Supreme Court of the United States by means of a writ of error.

Yick Wo, a subject of the Emperor of China, had migrated from China to California in 1861 and had carried on continuously for a period of 22 years a laundry business in the city of San Francisco. During the whole of this period his business had been located in one and the same premises. He applied on 1 June, 1885, for permission to continue his business, as the term of his licence was due to expire on 1 October, 1885, but this was refused. He was then arrested and tried by a Police Magistrate for continuing in business without a licence. On his refusal to pay the fine of $ 10 imposed

25. (1886) 118 U.S. 356.

on him he had been committed to prison to serve out the imprisonment awarded to him in default of payment of fine. It was in evidence that on 3 March, 1884, his premises had been inspected by the board of fire wardens of the City and certified by them as safe and providing necessary precautions against any outbreak of fire. The Health Officer had also certified that the premises were being maintained in a sanitary condition. At the time the ordinance in question was issued there were 320 laundries in San Francisco of which 240 were owned and operated by Chinese persons. Out of the total number of 320 laundries, 310 were constructed of wood, the same material that constituted nine-tenths of the houses in the city of San Francisco. It was admitted that all applications for a licence made by Chinese laundrymen, more than 200 in number, had been refused; while the petitions of others who were not Chinese, with only one exception, had been granted. The capital invested by the subjects of China in the laundry business in San Francisco was not less than $200,000 and the annual rents, taxes and gas and water charges paid by them was about $180,000. About 150 Chinese laundrymen had been arrested for having contravened the ordinance aforesaid while, as Yick Wo stated in his petition, 'those who were not subjects of China and who were conducting eighty odd laundries under similar conditions, are left unmolested and free to enjoy the enhanced trade and profits arising from this hurtful and unfair discrimination.'

The Supreme Court of the United States held: (1) that the ordinance conferred upon the supervisors naked and arbitrary power to grant or withhold a licence without reason and responsibility and therefore infringed the due process of law clause of the Fourteenth Amendment by which no person shall be deprived of his life, liberty or property without due process of law; (2) that apart from the question of the validity of the ordinance as vesting arbitrary powers, it was clear that, from the way in which it was applied in practice, it made an unjust discrimination against the Chinese so as to deny equal protection of the laws to them in violation of the mandate of the Fourteenth Amendment; (3) that the provision contained in this amendment that 'Nor shall any State deprive any

person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws' was of universal application, so that all persons within the territorial jurisdiction of the State, without regard to any differences of race or colour or nationality could claim its benefit and protection. The equal protection of the laws is a pledge of the protection of equal laws.

Mr. Justice Matthews dealing with the arbitrary character of the ordinance observed:

> That Court [the Supreme Court of California] considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or with-holding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. We are not able to concur in that interpretation of the power conferred upon the supervisors. There is nothing in the ordinance which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person and having complied with every reasonable condition demanded by any public interest, should failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of *mandamus* to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them sufficient authority to withhold their assent, without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint .... The ordinance in question in the present case .... does not prescribe a rule and conditions, for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure.

And both classes are alike only in this: that they are tenants at will, under the supervisors, of their means of living .... When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgement, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men'. For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

In holding that the ordinance, in the manner in which it was applied, made unjust discrimination in contravention of the equal protection of the laws, Mr. Justice Matthews observed:

In the present cases, we are not obliged to reason from the probable to the actual and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Four-

teenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by a public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution .... The present cases, as shown by the facts disclosed in the record are within this class. It appears that both petitioners have complied with every requisite, demanded by the law or by the public officers charged with its administration necessary for the protection of neighbouring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for their livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happened to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged.

V

Constitutional Safeguards for Freedom of Speech and Press in the United States

There are few countries in the world where freedom of expression is placed on so high a pedestal as in the United States of America. To adopt the language of Mr. Justice Frankfurter in a recent case, it is the cardinal faith of every American citizen that 'the channels of inquiry and thought must be kept open to new conquests of reason, however odious their expression may be to the prevailing climate of opinion.'[26] The builders of the American Constitution attached very great importance to the freedoms of speech and press. And by the first amendment to the Constitution they

26. See the dissenting opinion of Frankfurter J., in *Bridges* v. *California* (1941) 314 U.S. 252, p. 282.

expressly provided that Congress should not make laws abridging those freedoms. It has been held by the Supreme Court that these freedoms which are protected against abridgement by Congress are equally protected by the due process of law clause of the Fourteenth Amendment against abridgement by State legislation.[27]

(*a*) *Freedom of Expression Essential for proper working of a Democracy.* Mr. Justice Brandeis in his concurring opinion in *Whitney* v *California*[28] explaining the high place assigned to freedom of expression under the American scheme of government has observed as follows (pp. 375-376) :

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth ; that without free speech and assembly discussion would be futile ; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine ; that the greatest menace to freedom is an inert people ; that public discussion is a political duty ; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction ; that it is hazardous to discourage thought, hope, and imagination ; that fear breeds repression ; that repression breeds hate ; that hate menaces stable government ; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

27. *Gitlow* v. *New York* (1925) 268 U.S. 652; *Whitney* v. *California* (1927) 274 U.S. 357; *Near* v. *Minnesota* (1931) 283 U.S. 697; *Grosjean* v. *American Press Co.* (1936) 297 U.S. 233.

28. (1927) 274 U.S. 357.

(*b*) *Full Scope for the Intellectual Ferment of New Ideas.* A healthy and vigorous society has no reason to be afraid of the intellectual ferment of new ideas, ideas which at first sight might seem crude and repellent. Humanity has more to lose than to gain by such suppression. In the long run the chaff will be winnowed away from the grain and only those ideas will survive which have the power to get themselves accepted in the free competition of the market. As. Mr. Justice Holmes in *Abrams* v *United States*[29] has well observed :

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

(*c*) *Freedoms of Speech and Press not absolute.* It must not be supposed that the freedoms of speech and press which are secured against abridgement by Congress under the First Amendment and against infraction by the States by a judicial interpretation of the due process of law clause of the Fourteenth Amendment, confer an absolute right to speak or publish without responsibility whatever one may choose, or an unrestricted and unbridled licence that gives immunity from punishment for every possible use of language. The freedom guaranteed by the Constitution is ordered freedom. Otherwise the very foundations of organized society would cease to exist. The interests of social order and respect for the rights of others necessarily require restraints upon liberty of expression. And a State is not precluded from passing under its police power reasonable laws penalizing utterances which tend to corrupt public morals, or constitute defamation of individuals, which incite people to crime or which endanger the foundations of organized government by advocating resort to violent measures. And at a time of war, as Mr. Justice

29. (1919) 250 U.S. 616, p. 630.

Holmes has pointed out in *Schenck* v *United States*,[30] 'many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight' and 'no court could regard them as protected by any constitutional right'. Laws enacted by Congress and the States affecting the freedoms of speech and press are subject to judicial scrutiny in cases where their validity is challenged and the courts decide whether they are reasonable and should be upheld or unreasonable and should be vetoed. And as we shall see later in the fourth chapter, the courts in the United States have given an amount of latitude to freedom of expression which exists in but few countries in the world. It is not my purpose at this stage to discuss the limits of free expression and publication in that country. When considering the appropriate provision to be incorporated into the future constitution of India to safeguard freedom of speech and of the press, I shall discuss the amplitude of the liberty allowed under the parallel provision of the United States Constitution. In this context, I shall call attention to two important cases decided by the Supreme Court to indicate how anxious it is to protect freedom of expression from being unreasonably restrained by legislative provisions.

(*d*) *Near* v *Minnesota.* The case of *Near* v *Minnesota*[31] arose out of an action brought under a Minnesota statute of the year 1925 by the County Attorney of Hennepin county against the editor and other persons connected with *The Saturday Press,* a newspaper published in the City of Minneapolis to enjoin its publication on the ground that it was a malicious, scandalous and defamatory newspaper which was liable to be suppressed as a nuisance under the terms of the statute. The complaint was that the newspaper had made repeated attacks upon the Mayor of the City, the Chief of Police, and other public officers, charging them with being in league with gangsters, racketeers, and bootleggers, and of being remiss

30. (1919) 249 U.S. 47, 52.
31. (1931) 283 U.S. 697.

in the performance of their duties and lax in the enforcement of laws. The district court found that the editions of the paper produced at the trial were 'chiefly devoted to malicious, scandalous and defamatory articles' against public officers, that the paper was habitually engaged in publishing defamatory and scandalous matter, that this constituted a nuisance under the statute and therefore directed by its judgement that the defendants be perpetually restrained from producing, publishing, and circulating the paper.

The Supreme Court speaking through Mr. Chief Justice Hughes held that the statute in so far as it authorized the suppression of a newspaper was plainly an infringement of the liberty of the press guaranteed by the Fourteenth Amendment. Mr. Chief Justice Hughes in delivering the opinion of the Court observed as follows (pp. 713-721) :

If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and, unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship .... For whatever wrong the appellant has committed or may commit, by his publications, the State appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction—that is, for restraint upon publication .... The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals. The general principle that the constitutional guarantee of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provisions of State constitutions.

The importance of this immunity has not lessened. While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavouring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of Government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasize the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege......The statute in question cannot be justified by reason of the fact the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details), and required to produce proof of the truth of his publication, or of what he intended to publish, and of his motives, or stand enjoined. If this can be done, the legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship. The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of charges of misconduct and especially of official misconduct necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected. The preliminary freedom, by virtue of the very reason for its existence, does not depend, as this court has said, on proof of truth.

(*e*) *De Jonge* v *Oregon.* The case of *De Jonge* v *Oregon*[32] arose out of the conviction of the appellant Dirk De Jonge, for violation of the Criminal Syndicalism Law of the State of Oregon. The Act defined 'Criminal Syndicalism' as 'the

32. (1937) 299 U.S. 353.

doctrine which advocates crime, physical violence, sabotage or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution'. Having this as a preliminary definition, the act proceeded to describe a number of offences, embracing the teaching of criminal syndicalism, the printing or distribution of books, pamphlets, etc., advocating that doctrine, the organization of a society or assemblage which advocated it, and presiding at or assisting in conducting a meeting of such an organization, society or group. The prohibited acts were made felonies punishable by imprisonment for not less than one year nor more than ten years or by a fine of not more than $1,000 or by both.

The charge against the appellant was that the appellant assisted in the conduct of a meeting which was called under the auspices of the Communist Party, an organization advocating criminal syndicalism. The plea of the appellant in his defence was that although the meeting was held under the auspices of the Communist Party, neither criminal syndicalism nor any unlawful conduct was taught or advocated at the meeting either by the appellant or by others at the meeting, that the meeting was public and orderly and that in fact it was held for a lawful object, namely, to protest against illegal raids on workers' halls and homes and the shooting of striking longshoremen by the Portland police. The appellant who was a member of the Communist Party had spoken at the meeting protesting against the action of the police. It was true that under the terms of the Act a person who merely assisted in the conduct of a meeting held under the auspices of a party advocating criminal syndicalism, although the meeting itself was lawful, peaceable and orderly, would be deemed to have committed an offence. The question directly in issue in the case was whether such a provision in the statute could be held to be valid in view of the due process clause of the Fourteenth Amendment. The appellant had been found guilty and sentenced to imprisonment for seven years by the trial court. The conviction and sentence had been affirmed by the Supreme Court of Oregon. The appellant then preferred an appeal to

the Supreme Court of the United States raising the constitutional issue of freedom of speech as having been infringed by the provision of the act under which he had been convicted.

The Supreme Court in setting aside the conviction held that notwithstanding the objectives of the communist party, the appellant as an ordinary citizen was entitled to discuss issues of the day in a lawful way, without incitement to violence or crime, in order to seek redress of alleged grievances, and that consequently the Oregon statute as applied to the particular charge upon which the appellant had been indicted and convicted was repugnant to the due process clause of the Fourteenth Amendment. Mr. Chief Justice Hughes in delivering the opinion of the Court observed (pp. 362-365):

> His sole offence as charged, and for which he was convicted and sentenced to imprisonment for seven years, was that he had assisted in the conduct of a public meeting, albeit otherwise lawful, which was held under the auspices of the Communist Party. The broad reach of the statute as thus applied is plain. While defendant was a member of the Communist Party, that membership was not necessary to conviction on such a charge. A like fate might have attended any speaker, although not a member who 'assisted in the conduct' of the meeting. However innocuous the object of the meeting, however lawful the subjects and tenor of the addresses, however reasonable and timely the discussion, all those assisting in the conduct of the meeting would be subject to imprisonment as felons if the meeting were held by the Communist Party. This manifest result was brought out sharply at this bar by the concessions which the Attorney-General made, and could not avoid, in the light of the decision of the State court. Thus if the Communist Party had called a public meeting in Portland to discuss the tariff, or the foreign policy of the Government, or taxation, or relief, or candidacies for the offices of President, Members of Congress, Governor or State legislators, every speaker who assisted in the conduct of the meeting would be equally guilty with the defendant in this case, upon the charge as here defined and sustained......While the States are entitled to protect themselves from the abuse of the privileges of our institutions through an attempted substitution of force and violence in the place of peaceful political action in order to effect revolutionary changes of government, none of our decisions go to the length of sustaining such a curtailment of the right of free speech and assembly as the Oregon statute demands in its present application......
>
> ....Freedom of speech and of the press are fundamental rights safeguarded by the due process clause of the Fourteenth Amendment of

the Federal Constitution. *Gitlow* v *New York*, 268 U.S. 652, 666; *Stromberg* v *California*, 283 U.S. 359, 368; *Near* v *Minnesota*, 283 U.S. 697, 707; *Grosjean* v *American Press Co.*, 297 U.S. 233, 243, 244. The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. As this Court said in *United States* v *Cruikshank*, 92 U.S. 542, 552: 'The very idea of government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for redress of grievances.' The First Amendment of the Federal Constitution expressly guarantees that right against abridgement by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions,—principles which the Fourteenth Amendment embodies in the general terms of its due process clause........ These rights may be abused by using speech or press or assembly in order to incite to violence or crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed......It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects.

VI

CONSTITUTIONAL SAFEGUARDS FOR FUNDAMENTAL RIGHTS: THEIR MERITS AND LIMITATIONS DISCUSSED

The cases hereinbefore considered will, I think, show how the courts by exercising the power of judicial review have championed the cause of liberty and acted as a great bulwark against the arbitrary exercise of power. More illustrations of the way in which the power of judicial review operates in the domain of civil liberties will be given in the fourth chapter where I deal with the specific provisions to be incorporated into a Bill of Rights for New India. Nobody

who has had occasion to study the work of the Supreme Court in this sphere will fail to be impressed with the fine tradition which it has established by holding the scales of justice impartially between the rights of government and the rights of the individual.

But great as has been the contribution of the courts, and more especially of the Supreme Court of the United States, in building up a great tradition of liberty in the land, it is important to recognize that the help which the courts can render in safeguarding the lives and liberties of persons is subject to limitations. There may be cases of statutes transgressing constitutional provisions involving the fundamental rights of the citizen but if the people have meekly submitted to their operation, the courts can do nothing. It is only when an individual whose rights have been invaded has sought the aid of the court that it can interfere. Mr. Grenville Clark writing in the volume entitled *Constitutional Rights* issued by the American Academy of Political and Social Science, refers to the 'Red Rider' passed by the Congress of the United States in June 1935 practically without any discussion or dissent and allowed to remain on the statute book for about two years without its constitutional validity being challenged, in these words:

This rider provided that 'no part of any appropriation for public schools [in the District of Columbia] shall be available for the payment of any person teaching or advocating communism'. Under it approximately 4000 public school officials and teachers were required as a condition of drawing each instalment of salary to make affidavit that he or she did not in the preceding period 'in any school of the District of Columbia or elsewhere teach or advocate communism'. Under the official construction of this law, no teacher might discuss with a relative or friend in his own home any facts that he happened to know about the philosophy or workings of communism, unless either prepared to forfeit the salary or to swear falsely. I am informed that while this statute remained in force, virtually no mention of so much as the existence of Russia was made in the District of Columbia schools. Despite its fantastic character, this law remained in force for nearly two years, and, although possibly or probably unconstitutional, the courts had nothing to do with its disappearance from the scene. One influence alone caused its repeal in April, 1937—a gradually formed

public opinion which finally convinced Congress that the law was both ridiculous and out of tune with American life.[33]

To illustrate the point that court help cannot always be effective, we may take the case of refusal of permission by a local authority to hold a meeting at a pubilc park to discuss in a perfectly peaceful manner a topic of public importance. Such refusal enforced by police action may prevent the meeting from being held. The courts may later declare the refusal of permission as violative of the constituional guarantee of freedom of speech and assembly. But nothing that the courts can do after the event can restore the original position.

If any person forms the impression that all that a people need do to ensure the maintenance of civil liberties is to incorporate definite limitations upon the powers of government in the Constitution and that the judiciary will somehow play the rôle of a fairy godmother and prevent encroachments upon the domain of liberty, he would be making a serious mistake indeed. No doubt the help which courts can give by their power of judicial review is very precious ; but such help can only be a supplement to and not be a substitute for self-help. Eternal vigilance is the price of liberty. And as Mr. Justice Brandeis has well put it : 'The greatest menace to freedom is an inert people'.[34]

Mr. Grenville Clark emphasizing the rôle of the people in the maintenance of civil liberties has observed :

> The more we study the subject of civil liberties in the United States, the more we must realize the truth that it is upon the knowledge and spirit of the people that we must rely for any long-term security of civil liberties. If, for example, in the field of education there exists a general public feeling that a high degree of freedom of discussion is vital in the teaching of the social sciences we shall have such freedom. Without such a general recognition, the discussion of controversial issues in this field will be seriously curtailed, irrespective of the First Amendment, the Bills of Rights of the States or of

33. Grenville Clark in his article on *Civil Liberties: Court Help or Self-Help* in the volume entitled *Constitutional Rights* issued by the American Academy of Political Science, pp. 3-4 (1938).

34. *Whitney* v. *California* (1927) 274 U.S. 357, p. 375.

anything the Supreme Court or any other court can do. And if the general public feeling favours or permits the suppression of meetings of communists, on the one hand, or of bankers' conventions on the other, any remedy that the courts can supply must be temporary, illusory or inadequate.[35]

Constitutional safeguards alone will not ensure to a people the enjoyment of basic liberties. The ultimate sanction which preserves to a people the benefits of a free regime rests upon the determination of the people themselves not to give quarter to the forces that may threaten to imperil it. The question naturally arises whether it would not be better for the people to rely upon their own efforts to stave off encroachments upon their basic liberties instead of leaning upon constitutional provisions. My answer is that, while a people cannot afford entirely to depend upon constitutional safeguards but must exercise an eternal vigilance to prevent invasion of their basic freedoms, the help which the courts by their power of judicial review can give them, even though in a limited field, is so very precious that they would do well to have binding constitutional safeguards incorporated into their constitution. The experience of the United States in working a Constitution containing guarantees for fundamental rights has made it clear that, in the matter of protection of basic liberties, the courts generally, and the Supreme Court of the United States in particular, have rendered invaluable service. In the conditions which exist in India today when it is of prime importance to assure to every individual, particularly to members of minority communities, the fullest freedom to lead his own life, the rôle of the courts in building up a great tradition of liberty in the land is of the highest importance.

That the United States comprising a vast assembly of minority groups has become welded into a great and prosperous nation ought to serve as a beacon light for all humanity. In race, religion and in traditions, the people differ from pole

35. Grenville Clark in his article on 'Civil Liberties: Court Help or Self-Help', in *Constitutional Rights*, issued by the American Academy of Political and Social Science (1938), pp. 7-8.

to pole. Every nationality of Europe is represented in its population. There is an important negro element in its population texture. Yet, out of all this diversity, the United States has evolved a basic unity. Two important factors, in my view, have contributed to this happy result. The first factor is the federal system operating in that country which has been able to harmonize national unity with regional freedom. In fact the United States has demonstrated beyond doubt that national strength is not incompatible with local autonomy. If what is now the territory of the United States had been parcelled out among half a dozen or more independent States, it is more than probable that North America like the continent of Europe would have become the cockpit of national rivalries and jealousies. And since the federal union functions as a single economic unit without any restrictions being placed on the free flow of commerce across State frontiers the country has gained immeasurably in economic strength. In fact, the United States is the greatest single free market in the world. The second factor which has contributed to the great success of the country is the cardinal faith of every American in the worth and dignity of the human soul and in the need for a free atmosphere for the individual to rise to the full height of his powers. It is this faith in human liberty which shines through the pages of that great document which Thomas Jefferson drafted in 1776 to serve as the spiritual banner of the American Revolution. It is this faith again which animates that historic message which the late President Franklin D. Roosevelt sent to the seventy-seventh Congress on 6 January 1941, pledging his nation's support to all those who were struggling for the establishment of the Four Freedoms everywhere in the world, namely, freedom of speech, freedom of worship, freedom from want and freedom from fear.

The guarantees for fundamental rights contained in the Bill of Rights of the United States Constitution are a visible expression of that nation's faith in the worth and value of human beings as persons. Under the American scheme of government human freedom is not subordinated to governmental functions. The attempt is rather to reconcile the two so that everybody may have the largest freedom consistent

with the demands of social order to lead his own life free from hampering restrictions. In so favourable an atmosphere it is not surprising that minorities feel secure and give of their best to the country.

VII

THE POSITION OF THE BASIC LIBERTIES OF THE SUBJECT IN ENGLAND

(a) *The operation of the rule of law.* Two of the notable features of the British Constitution are the supremacy of Parliament and the prevalence of the rule of law as opposed to the operation of arbitrary power in the working of its legal institutions. The constitutional struggles of the seventeenth century between Crown and people culminating in the passing of the great constitutional charters of the Petition of Right, 1628, the Bill of Rights, 1689, and the Act of Settlement, 1701, not only established the supremacy of parliament in place of royal absolutism but also vindicated the liberty of the subject against the exercise of arbitrary power. The theory under which the Stuart monarchs acted that the king was entitled to rule by divine right and that his powers were not subject to but above the law was completely exploded. And if today the liberty of the subject rests upon secure foundations in England it is primarily because of the fact that the rule of law permeates the whole legal and political fabric of the land. Two characteristic traits of the rule of law may be noticed here. The first is, as Professor Dicey has pointed out:

> No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide arbitrary, or discretionary powers of constraint.[36]

36. A. V. Dicey, *Law of the Constitution,* Eighth Edition pp. 183-4.

The second trait is the universal subjection of all persons, including officials, to one law administered by the ordinary courts. Every official from the Prime Minister down to the constable is bound to regulate his actions in strict accord with the law; and if he does any act without any legal justification he can be called to account in the ordinary tribunals of the land. As Professor Dicey has put it:

> With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority.[37]

(b) *Independence of the judiciary in England.* It must be remembered that one of the greatest safeguards for the liberty of the subject in any country is the existence of an independent judiciary, which deals out justice without fear or favour. Prior to the Act of Settlement, the English judges held office on a precarious tenure, as they were liable to be removed at the will of the Crown. Especially during the reign of the Stuart monarchs, interference by the Crown in the administration of justice was all too frequent.[38] The Act of Settlement, 1701 (12 & 13 Will III, Chap. 2, Section 3) provided that 'Judges' Commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established, but upon the address of both Houses of Parliament it may be lawful to remove them'. As Professor Holdsworth in commenting upon this provision has observed:

> This clause removed the Bench from the political arena, made it impossible for the Crown, House of Commons, or House of Lords to exercise pressure upon it, and thereby guaranteed the impartial administration of the law. In consequence, the supremacy of the law has become the best of all securities for the liberties of the subject, against both the claims of the royal prerogative and the claims of parliamentary privilege.[39]

37. A. V. Dicey, *Law of the Constitution*, Eighth Edition, p. 189.
38. W. S. Holdsworth, *A History of English Law*, Vol. V, pp. 439-40.
39. W. S. Holdsworth, *A History of English Law*, Vol. VI, p. 234.

Today the judiciary in England has carved out for itself a high place in the esteem and affection of the people as an independent institution which can be trusted to deal out even-handed justice not only between one citizen and another but also between the State and the citizen. The establishment of the judiciary as an independent and impartial institution in England largely rests upon the fact that judges hold office during good behaviour and not at the arbitrary will of the executive. A judge of the Supreme Court, if guilty of misconduct, can be removed from office by the Crown upon an address voted by both houses of Parliament. Judges of inferior courts like county court judges and coroners are removable by the Lord Chancellor for incompetence or misconduct (see County Courts Act, 1888, Section 15, Coroners (Amendment) Act, 1926, Section 2(5)).

(c) *The Supremacy of the English Parliament.* From what I have mentioned in the foregoing paragraphs, it is clear, I think, that the English Constitution provides adequate safeguards against the arbitrary exercise of power by the executive. But it is important to notice that so far as the English legislature itself is concerned, in view of the supremacy of Parliament, there is no legal check on the abuse by that body of its own powers. The English Parliament might pass laws making serious encroachments upon the liberties of the subject or create flagrant discriminations against particular sections of the community in the matter of religious liberty or the holding of secular offices and yet no court of law in England is able to provide redress against any such arbitrary, unjust or discriminatory laws because courts in that country cannot question the validity of laws passed by Parliament. True enough that, at the present day, the English Parliament, in the matter of the basic liberties of the subject and in assuring to every individual, whatever may be his religious faith, equality of treatment in the eye of law, acts with a commendable sense of fairness and self-restraint. But these traits have not always been in evidence in English Parliamentary history. The Roman Catholic, Nonconformist, Quaker and Jewish elements of the population in England, have, until quite recent times, laboured under grave

disabilities under various parliamentary enactments. Indeed, the present equality of all persons before the law, irrespective of the religious faith which they profess, has only been attained by a painfully slow process of development in England.

(d) *Discriminatory laws which operated formerly on the Catholic, Nonconformist, Quaker and Jewish elements in England.* It is not my purpose to sketch here the history of that long-drawn-out process. I shall content myself with giving a few examples of discriminatory and unjust laws which held sway until not very long ago. To a rational person of today, the notion that before a person could be appointed to hold a secular office in a State, he must express his belief in a particular form of religion, must seem quite abhorrent. Today we accept as axiomatic that political privileges must never be made to depend upon theological beliefs. But in England, until very recent times, persons not belonging to the Church of England were placed under grave disabilities. The Test Act of 1673 passed during the reign of Charles II required from all holders of temporal office the taking of the sacrament and a declaration of rejection of the doctrine of transubstantiation. An Act of 1678 made it compulsory for members of both Houses of Parliament, before they took their seats, to take the oaths of allegiance and supremacy, and a declaration that the worship of the Church of Rome was idolatrous. Speaking of the disabilities under which, until recent times, certain sections of the population laboured because of their religious beliefs, W. E. H. Lecky has observed as follows:

In England, it is somewhat humiliating to observe how slowly this constitutional equality was attained. By an Irish Act of 1793, and by English Acts of 1813 and 1817, all ranks of the army and navy were gradually opened to Catholics and Dissenters; while the abolition of Test and Corporation Acts in 1828 placed Protestant Dissenters on an equality with the members of the Established Church in corporate and civil offices. Then followed the Catholic Emancipation Act of 1829, and in 1833 and 1838 Acts were carried permitting Quakers, Moravians and some other persons, who objected to swearing, to substitute in all cases an affirmation for an oath. The conflict about the emancipation of the Jews raged long and fiercely; but in 1839 they were permitted to take oaths in the form that was binding on their consciences, in 1845

they were admitted into corporate offices, in 1858 they made their way into the House of Commons, and at a much later period a distinguished living Jew has been raised to the peerage and made Lord Lieutenant of his county. The admission, after a long struggle, to the House of Commons of an avowed atheist, in the person of Mr. Bradlaugh, completed the work of abolishing religious disqualifications in England.[40]

Under the Act of 1753, marriages of all parties other than Jews and Quakers were required to be celebrated in the Parish Church, according to the rites of the English Church. The Nonconformists naturally resented this measure. Moreover, if parents desired to secure legal evidence of the birth of their children, they could only do so by having them baptized in the Parish Church. And Nonconformists and Catholics had very strong objection to such baptisms. The reformed Parliament of 1836, under the initiative of Lord John Russell, passed legislation permitting Dissenters to celebrate marriages in their own chapels according to their own rites, establishing a system of civil marriages to those who desired it, and creating machinery for the registration of births, deaths and marriages by civil officers.[41]

As regards admission to Universities, most of the discriminations made on the ground of theological faith only ceased after an Act passed in 1871.[42] W. E. H. Lecky discussing this type of discrimination has observed:

The same spirit that led ecclesiastics in the eighteenth century, in the interests of their monopoly, to defend the law which degraded the sacrament into an office test, still prevailed, and the scandalously profane system of compelling boys fresh from school to purchase their admission into Oxford by signing the Thirty-nine Articles, which not one in a hundred had seriously studied, was strenuously supported. Dublin University has the honourable distinction of having long preceded the English Universities in the path of true Liberalism, for even before 1793 Catholics and Nonconformists were admitted among its

40. W. E. H. Lecky, *Democracy and Liberty,* (1913 Edition) Vol. I, p. 514.

41. A. B. Keith, *The Constitution of England from Queen Victoria to George VI,* (1940) Vol. II, p. 455.

42. 34 and 35 Vict. C. 63.

students, and after 1793 they were admitted to its degrees, though not to its scholarships and fellowships. In the Scotch Universities, also, there was no religious test against Dissenters. In Cambridge, Nonconformists might become students, but no one could obtain a degree without subscribing to the Thirty-nine Articles. At Oxford, Nonconformists were repelled on the very threshold, for the subscription was exacted at matriculation. English Dissenters were not only excluded from the inestimable advantage of higher education, and from the many great prizes connected with the universities—they were also seriously impeded, by the want of a university degree, in their subsequent professional careers. This last grievance was removed by the foundation of the London University in 1836. Being a mere examining body, it could not offer the teaching advantages, nor did it possess the splendid prizes, of the older universities; but it at least conferred degrees which were highly valued, and which were encumbered by no theological test. Measures for opening Oxford and Cambridge to the Dissenters were again and again introduced by Liberal ministers, again and again carried in the Commons, again and again rejected in the Lords. In 1854, Nonconformists were allowed to obtain the B.A. degree in the old English Universities but they could not obtain higher degrees, and although they might compete at examinations for the great university prizes, they could not enjoy them. At last in 1871, a great measure of enfranchisement, which was originally placed in the hands of Mr. Coleridge, and had failed five times in the Lords, became law, opening nearly all offices and degrees in the Universities without theological restriction. Seven years later the few remaining distinctions, with the very proper exception of degrees and professorships of divinity, were abolished by a Conservative Government.[43]

The illustrations given in the foregoing paragraphs—and these are not exhaustive—show how, until recent times, citizens not belonging to the Church of England were discriminated against in various departments of life solely because of their religious faith. Most of these disabilities were directly traceable to parliamentary enactments. A slowly awakened public conscience realizing the utter iniquity of discriminations based on religious faith has succeeded in abolishing practically all of them. And it is most unlikely that any English Parliament at the present day will seek to revive such discriminatory types of legislation. Nor is it probable that in regard to the basic liberties like the freedom of speech

43. W. E. H. Lecky, *Democracy and Liberty,* (1913 Edition) Vol. I, pp. 516-517.

and press and freedom of person, a modern English Parliament, except in an emergency like war, will impose arbitrary restrictions.

All this can only mean that the English people have, after a long course of self-discipline, developed a strong sense of fairness and a love of liberty and will not allow themselves to be easily swept off their feet by sudden gusts of passion. But the possibility of the English Parliament taking decisions harmful to personal liberties, though remote, cannot be ruled out altogether. The question, therefore, arises, whether it is wise to entrust the legislature of a country with supreme powers in the domain of personal liberties when the temptation for the abuse of authority is so very great. Power corrupts and absolute power corrupts absolutely. The majority in a legislature, unless it is highly-disciplined and fair-minded, may easily translate its passions and prejudices into legislative enactments to be used as engines of tyranny over minority groups in a country. That aspect needs to be constantly kept in view when we are dealing with the problem of safeguards for fundamental rights in a new Indian Constitution.

VIII

Why India should take the United States and not England for her Model in regard to Provision of Safeguards for Fundamental Rights

It seems to me that, in the matter of protection of the basic rights of the citizen, we would do well to take the United States, the Constitution of which contains safeguards for such rights, as our model, rather than England, where those rights ultimately rest upon the good sense of the people as there are no external checks to control the legislative powers of the English Parliament. India, like the United States, has a large number of minority groups. If these groups are to live in peace and amity and contribute to the common good of the land, they must be made to feel that their basic liberties are secure against the whims of legislative majorities and that

they can directly appeal to the courts when those liberties are invaded. Long reflection upon this subject has convinced me of the imperative necessity of incorporating into the future constitution of India, a carefully chosen code of fundamental rights. And I think the experience of the United States in working a constitution containing safeguards for the maintenance of basic civil liberties shows that those constitutional provisions have, on the whole, worked very well indeed.

IX

Distinction between Constitutional Safeguards for Basic Personal Rights and Property Rights

But fundamental rights protected by a constitution may not stop with the basic liberties of the individual. They may comprehend property and contractual rights also. In deciding upon what provisions have to be made in the future Indian Constitution to safeguard such rights, we must proceed with great care. Experience of the working of certain clauses of the Constitution of the United States has, I would submit, shown, that legislative freedom to make economic adjustments demanded by the complex conditions created by the rapid march of science and industry may be seriously impaired by constitutional restrictions. When I say this, I have particularly in view three specific clauses of the United States Constitution, namely, the Contract Clause contained in Article I section 10 which prevents a State from making any law impairing the obligation of contracts, and that portion of the due process of law clauses contained in the Fifth and Fourteenth Amendments which forbid the Congress and the States from making any law depriving a person of his property without due process of law. A somewhat detailed examination of how these clauses have operated in practice will be made in the second and third chapters. At this point, it would be sufficient for us to take note of one or two points relating to the operation of these provisions. An Indian or an English lawyer who makes a study of American constitutional law will at once be struck with the frequency with which these clauses have been invoked to challenge the constitutional validity of

legislation designed to make economic adjustments in the dynamic conditions of American economic and social life. Many pieces of legislation have foundered on these constitutional rocks. Vested interests have not infrequently taken refuge behind these constitutional battlements and successfully torpedoed attempts made by the legislatures to subject economic power to social control.

Few phrases in the domain of law have been more litigated or have more successfully evaded precise delimitation of its actual content as the phrase 'due process of law' which occurs both in the Fifth as well as the Fourteenth Amendments to the Constitution. In this context I shall deal in a general way with this phrase as affecting property rights only. Under the interpretation put by the Supreme Court on the due process of law clauses of the Fifth and Fourteenth Amendments as applicable to property rights, the requirements of due process are held to be infringed in the case of Federal and State laws which, in the opinion of the court, are unreasonable, arbitrary or capricious. As Mr. Justice Roberts in delivering the opinion of the Supreme Court in *Nebbia* v. *New York*[44] has observed (p. 525) :

> The Fifth Amendment, in the field of Federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guarantee of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

Whether the requirements of due process have been satisfied in the case of any law ultimately depends upon what view the majority of judges of the Supreme Court adopt towards it. And many instances could be given of a legislative enactment being declared invalid on the ground of its being unreasonable as five judges of the Supreme Court thought so,

44. (1934) 291 U.S. 502.

while four of their colleagues were inclined to support its validity. And I may also mention that there have been notable instances of the view of the minority becoming the doctrine of the Supreme Court when that tribunal has reconsidered its decision in a later case. I shall refer to a few such cases when I deal with the due process and contract clauses in the second and third chapters. The question naturally arises whether it would be wise to entrust the fate of legislative experiments initiated for the purpose of grappling with specific economic problems of the day to the judicial process, when the judicial standards adopted to test the unreasonable or arbitrary character of those experiments are so very uncertain and indefinite. The answer, in my opinion, is, that the courts should not have so heavy a responsibility cast upon their shoulders. It is not so much a question of whether the courts will use their power in this regard wisely or unwisely as whether they are the proper custodians of such power. If a legislature passes a law affecting property rights which the majority of the electorate regards as unreasonable, arbitrary, or capricious, the appeal must rather be to the polls than to the courts. To adopt the language of Chief Justice Waite in the famous case of *Munn* v. *Illinois*,[45] 'for protection against abuses by legislatures the people must resort to the polls, not to the courts.'

During recent times, cases in which litigants, including corporations, have invoked the due process clause of the Fourteenth Amendment to challenge the validity of social and economic legislation enacted by the States have been steadily on the increase. While the general attitude of the Supreme Court is one of deference to the judgement of the legislature, many instances could be given of that Court having set aside legislative measures adopted by the States as unreasonable and arbitrary. The rôle of the Supreme Court as a censor over State legislation affecting property rights has evoked sharp comments not only from critics outside but also from eminent judges of that Court itself. Senator Borah, in the Senate

45. (1877) 94 U.S. 113.

debate on Mr. Charles E. Hughes's nomination for the office of Chief Justice of the Supreme Court, said, that the Supreme Court had become, under the Fourteenth Amendment, the 'economic dictator of the United States.'[46] That eminent judge Mr. Justice Holmes, in his dissenting opinion in *Baldwin* v. *Missouri*[47] expressing his concern at the ever increasing scope given to the Fourteenth Amendment in cutting down the powers of the States observed (p. 595) :

> I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the 14th amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this court as for any reason undesirable. I cannot believe that the amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and earlier decisions to which I have referred. Of course the words 'due process of law' if taken in their literal meaning have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification still we ought to remember the great caution shown by the Constitution in limiting the power of the States and should be slow to construe the clause of the 14th Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass.

It can hardly be denied that these pronouncements err on the side of exaggeration. The Supreme Court in performing its judicial function under the Fourteenth Amendment of assessing the validity of State legislation as contravening the requirements of due process of law, has not been provided by the Constitution with any chart and compass by which to steer its course in this the most difficult of all domains. Nor was it at all easy for the framers of this provision to define with precision what constitutes 'due process of law'. The Supreme Court, in the absence of any guidance from the Constitution, has been thrown upon its own judgement to formulate a

46. *New York Times*, 12 February 1930.
47. (1930) 281 U.S. 586.

workable test. And the test which that Court has formulated for determining the validity of State legislation involving property rights challenged as infringing the due process of law clause of the Fourteenth Amendment is to ascertain whether such legislation has transgressed the limits of reasonableness or is otherwise arbitrary or capricious. When a test so fluid in character is applied by the Supreme Court to judge the validity of a complicated statute, differences of opinion not infrequently arise even among the members of the court itself as to whether the challenged enactment conforms to or transgresses the limits of reasonableness. Nor is this a matter for surprise. For it is easy enough to conceive of a situation where two judges honestly reach divergent conclusions upon the same factual data. But the whole point, in my submission, is, whether it would be wise for the constitution-builders to incorporate provisions in the Constitution giving to the courts a general oversight over legislation involving property rights. If such provisions are in fact embodied in the Constitution and if a Court in exercising its power of judicial review expressly granted to it sets aside any legislative enactment as unreasonable or capricious and thus overrules the judgement of the legislature which has promulgated it, one cannot complain against that tribunal for having used its powers in that regard. There may, no doubt, be room for honest differences of opinion whether the court was right in reaching the conclusion which it did in any particular instance. But if the court blindly endorses every legislative enactment as satisfying the requirements of due process of law upon the assumption that the legislature concerned must be deemed to know its business and that its judgement regarding the expediency and reasonableness of such legislation is final, then the court obviously has abdicated its constitutional function. I feel strongly that in regard to legislation affecting property rights the legislatures must be allowed to devise their own controls without their functions in this regard being subjected to judicial oversight; and the corrective of the work of the legislatures in case of abuse of their powers must be found in the free play of public opinion and not be a corrective embodied in the judicial process. The point which I wish to make at this stage,

therefore, is, that great caution must be exercised in introducing provisions into the Constitution to safeguard property and contractual rights so that they may not tie the hands of the legislatures when they are engaged in framing legislation with a view to find effective solutions for the manifold economic problems which so often arise in a dynamic society. I shall revert to this subject again in the second and third chapters. I may, however, point out at this stage that I am introducing a specific provision into the draft bill of rights suggested for new India, providing, that no person shall be deprived of his property anywhere in the Federation of India save by the authority of a competent Federal or State law and also prescribing that a Federal or a State legislature shall not have power to make any law authorizing the compulsory acquisition for public purposes of land or any commercial undertaking unless the law provides for the payment of just compensation.

From what I have said in the foregoing paragraphs, I have, I hope, made the distinction clear between safeguards for the basic personal rights of an individual such as his right to personal freedom and security for his life, freedom to express himself, freedom to worship god in his own way, and liberty to pursue a calling of his own free choice on the one hand, and safeguards which have in view the protection of an individual's rights of property and contractual rights. As to the first group of liberties, I am clearly of the opinion that the Constitution ought to provide for adequate safeguards against unreasonable abridgement or capricious interference at the hands of irresponsible legislative majorities, as the maintenance of these liberties is the indispensable requisite of a free society. Of course, these basic rights are not absolutes and may and do require, on occasions, to be curtailed in the larger interests of society. But the maintenance of these basic freedoms must be the rule and restraints imposed but exceptions to it. As to the second group of rights which may be broadly described as property and contractual rights, I would allow the largest amount of discretion possible to the legislatures as the imposition of tangible restraints upon their powers would lead to the stagnation of society by giving an entrenched position to property and privilege. Constitutional provisions

which seriously curtail the power of a government to make the laws governing private property harmonize with economic and social changes may well have far-reaching consequences on the life of the people. And it is only right, therefore, that great care should be taken in introducing such provisions into the Constitution. These and other kindred problems will be considered in greater detail in the second and third chapters.

X

THE PROBLEM WHETHER THE BILL OF RIGHTS SHOULD CONSIST OF PRECEPTS OR GUARANTEES

There is one school of thought which takes the view that a bill of rights to be embodied in a Constitution ought merely to take the form of general principles which the legislature and other public authorities would be expected but not compelled to observe and that their infraction should not lead to any legal consequences. Professor W. B. Munro has put the position of the exponents of this view lucidly in these words:

> It has been suggested that a bill of rights ought to contain precepts, not guarantees. It should set forth a creed of individual liberty, a series of things which the public authorities are expected (but not compelled) to do or not to do, as the case may be. These precepts would not operate as iron-clad mandates or restrictions, to be scrupulously observed under all circumstances, on penalty of having legislative actions declared unconstitutional. This would transfer the responsibility from the courts to the legislature and from the legislature to the electorate, where it belongs. The ill-starred Weimar Constitution of the German Reich incorporated such an arrangement, but owing to the vicissitudes of Teutonic politics, it never received a fair trial. 'The house of every German is his sanctuary and is inviolable,' this Constitution declares. Then there is added to it the qualification that 'exceptions are permissible only under the authority of law'.[48]

48. See The article 'An Ideal State Constitution' by Dr. William B. Munro in *The Annals of the American Academy of Political and Social Science* entitled *The State Constitution of the Future*, Volume 181, September 1935, p. 6.

With the view expressed above I do not agree. I really cannot understand what useful purpose a bill of rights in a Constitution would serve if it merely consisted of certain precepts which would in no way be binding on the legislature, the executive and the judiciary. Such a bill of rights would have as little effect upon the conduct and behaviour of the legislature, the executive and the judiciary, as a collection of idealistic copybook maxims would have upon the conduct and behaviour of an ordinary school boy. A bill of rights which is made so innocuous will moulder in the folds of the Constitutional parchment without the people in any way benefiting from its presence. Popular slogans, and high-flown sentiments which carry with them no legal sanctions are but broken reeds upon which to rely for safeguarding the liberties of the people. And a bill of rights to be effective must contain guarantees for the basic rights of the citizen, guarantees which he can invoke in his aid in a court of law whenever any infraction of a right so guaranteed is committed.

XI

THE RECENT AUSTRALIAN REFERENDUM WITH REGARD TO SAFEGUARDS FOR FREEDOM OF EXPRESSION AND FREEDOM OF RELIGION

In Australia, the Commonwealth Government introduced recently a bill into the Commonwealth Parliament for an Act entitled the Constitution Alteration (Post War Reconstruction and Democratic Rights) Act, 1944, in order to alter, after securing the approval of the electorate, the Constitution for a limited period by empowering the Commonwealth Parliament to make laws in relation to post-war reconstruction, and by including provisions to safeguard freedom of speech and expression and freedom of religion. The main object of the measure was to expand the powers of the Commonwealth Parliament by investing it with authority over a number of important matters such as the reinstatement and advancement of those who had been members of the fighting services of the Commonwealth during any war, and the advancement of the

dependants of those members who had died or been disabled as a consequence of any war; employment and unemployment; organized marketing of commodities and trusts, combines and monopolies. That measure also contained two provisions dealing with democratic rights. The first of these ran thus: 'Neither the Commonwealth nor a State may make any law for abridging the freedom of speech or of expression.' And the second provided: 'Section one hundred and sixteen of this Constitution shall apply to and in relation to every State in like manner as it applies to and in relation to the Commonwealth.' The object of the latter was to make section 116 of the Commonwealth of Australia Constitution Act, 1900, which provides that 'the Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the commonwealth', applicable to every State in like manner as it applied to and in relation to the Commonwealth.

Dr. Herbert E. Evatt, Attorney-General and Minister for External Affairs, speaking on the second reading of the Bill in the House of Representatives on 9 March 1944, referred to these two amendments as follows:

> As the result of long struggles, freedom of speech and freedom of religion seemed securely established in the modern democracies; but the rise of the twentieth century dictatorships in Europe has shown that fundamental rights can be swept away and that the consequences can be disastrous. In the Government's view, the two freedoms—freedom of expression and freedom of religion—are fundamental to the whole idea of democracy. It would be wise to include them as specific safeguards in the Constitution. I have emphasized previously the desirability of taking this course, and I pointed out at the Convention that my opinion was strengthened, not weakened. Both in the United States of America and in Australia, the courts have held that analogous guarantees of individual rights are not absolutes, to be exercised independently of the rest of the Constitution. Otherwise, liberty would degenerate into license. The freedom guaranteed by the Constitution is ordered freedom. Therefore, the guarantee of freedom of speech and expression does not protect any person from the ordinary legal consequences of publishing defamatory, seditious, blasphemous or obscene matter. The guarantees are regarded as subject to the require-

ments of public order, safety and morals, and also to those of national security in time of war. For example, the present war has made it absolutely necessary, in the interests of public safety, to impose restrictions upon the publication of matter likely to be prejudicial to the war effort. Such restrictions are permissible in time of war, but not in time of peace. Experience has shown, however, that guarantees of this kind are an effective protection for the individual against repressive legislation. The guarantee of freedom of expression will prevent the imposition, in time of peace, of such war-time restraints as censorship. It will encourage or ensure the free discussion of public affairs which is essential to enable the people to exercise their rights as citizens. Section 116 of the Constitution already contains a guarantee of the freedom of religion, based upon the provisions of the United States Constitution. This is a safeguard against Commonwealth action only, which is anomalous, especially since, by their very nature, the legislative powers of the State rather than those of the Commonwealth are the more likely to involve the risk of interference with religious freedom. The proposed amendment simply extends to the States the existing constitutional provision contained in Section 116. The safeguard has been adopted in the Constitution of Tasmania but in no other State. It will be remembered that in President Roosevelt's famous reference to the 'Four Freedoms', he referred, first to 'freedom of speech and expression', and secondly, to 'freedom of every person to worship God in his own way'. These are two fundamental freedoms which can and should be included to safeguard individual rights throughout Australia.[49]

The proposed law for amending the Australian Constitution was submitted to a referendum of all the electors in August 1944 and was thrown out by a majority. I should like to draw pointed attention to the fact that the measure for altering the Constitution was voted upon by the electorate as a unit though it consisted of a number of provisions. The clauses for the expansion of the Commonwealth powers were linked up with those which embodied guarantees for fundamental rights. I do not know what exactly would have been the result of the referendum if the electors had been called upon to vote upon the democratic guarantees alone. The inclusion of such guarantees in the Constitution had been sup-

49. Commonwealth of Australia, *Parliamentary Debates*, Seventeenth Parliament, First Session, 1943-4, No. 7, 8-9 March 1944, pp. 1153-54.

ported by prominent church leaders and leading newspapermen.[50]

I look upon the recent Australian proposal to include guarantees for the fundamental rights of freedom of speech and expression and freedom of religion as an indication that many thoughtful men in Australia realize the need for creating safeguards for those rights to ensure the proper working of a free and democratic society. It must be remembered that Australia is a country whose population is largely British in extraction. It has no serious minority problems to solve. And its legal institutions are steeped in the traditions and atmosphere of British jurisprudence. In spite of all these factors, many people in Australia, though they may not yet be in a majority, have seriously begun to consider whether it would not be wise to introduce safeguards for the fundamental rights of freedom of speech and expression and freedom of religion into the Constitution instead of relying upon the force of public opinion and good sense of the people alone to ensure them the enjoyment of those basic rights.

XII

Constitutional safeguards for fundamental rights should be binding on the governments of the Federal units also

An important point to be considered is whether guarantees for fundamental rights to be embodied in the future Constitution of India should bind only the Federal Government or should be effective even as against the governments of the Federal units also. For reasons which I shall mention presently, I am definitely of the view that fundamental rights to be incorporated in the Constitution—with a few exceptions to be referred to in the fourth chapter—should bind not only the Federation but also the Federal units. And, following the theory of the United States Constitution, they should constitute

50. *Federal Referendum, The Case For and Against,* a publication issued under Authority by the Government Printer, Sydney, p. 10.

limitations upon all the powers of such governments, legislative as well as executive and judicial powers. I may mention that in the United States, although fundamental rights like the freedoms of press and speech, the right of the people peaceably to assemble and petition government for redress of their grievances, freedom for the free exercise of worship, the right of an accused for a fair and speedy trial, are expressly guaranteed against abridgement or invasion by the Federal government, those rights, though not specifically mentioned in the Constitution as available to the citizen against the States, have as a matter of fact, been recognized as comprehended under the Fourteenth Amendment by a judicial interpretation of the due process of law clause of that Amendment which provides that no State shall deprive any person of life, liberty, or property, without due process of law. As Mr. Justice Sutherland in his opinion for the Supreme Court in *Grosjean* v. *American Press Co.*[51] has pointed out:

......certain fundamental rights, safeguarded by the first eight amendments against Federal action, were also safeguarded against State action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution. That freedom of speech and of the press are rights of the same fundamental character, safeguarded by the due process of law clause of the Fourteenth Amendment against abridgement by State legislation, has likewise been settled by a series of decisions of this court beginning with *Gitlow* v. *New York*, 268 U.S. 652, 666, and ending with *Near* v. *Minnesota*, 283 U.S. 697, 707. The word 'liberty' contained in that amendment embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as well. *Allgeyer* v. *Louisiana*, 165 U.S. 578, 589.

The importance of the due process of law clause of the Fourteenth Amendment as a check upon State action interfering with the basic liberties of the subject, and the magnificent support which it has given to the American citizen to defend his fundamental rights against arbitrary exercise of power by any authority of the State can hardly be exaggerated. As

51. (1936) 297 U.S. 233, pp. 243-44.

Mr. Justice Van Devanter in his opinion for the Supreme Court in *Herbert* v *Louisiana*[52] has observed, the due process clause requires 'that State action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'

The rôle of the equal protection of the laws clause of the Fourteenth Amendment by which no State shall 'deny to any person within its jurisdiction the equal protection of the laws' in the domain of civil liberties is next only in importance to that of the due process clause of the same amendment. It is a valuable bulwark against any unfair or unjust discrimination sought to be practised by a State against any class of individuals. The Congress under Article I Section 9 clause 3, and the States under Article I section 10, are prohibited from passing any bill of attainder or *ex post facto* law. The first eight amendments of the United States Constitution, the Fouteenth Amendment, the provisions contained in sections 9 and 10 of Article I against the passing of *ex post facto* laws or bills of attainder, therefore provide guarantees, some expressly, and some impliedly, to the individual against both Federal as well as State action trenching upon his fundamental rights. I may, in this context, mention that cases involving infraction of fundamental rights through State legislation or State executive action are far more frequent than cases in which similar complaints against Federal legislation or Federal executive action are made. And the protection afforded by these clauses in safeguarding the basic liberties of the subject in the United States is of the highest importance. It seems to me that we in India would do well to provide adequate safeguards in the Constitutional document for the basic rights of the individual against arbitrary or unjust invasion or abridgement by Federal as well as State action.

52. (1926) 272 U.S. 312, p. 316.

XIII

Position summed-up

I shall now sum up the result of the discussion which has proceeded so far: (1) There is imperative necessity for incorporating a bill of rights in the future Indian Constitution for safeguarding the basic liberties of the individual. (2) The bill of rights to be embodied in the Constitution should consist of guarantees enforceable in courts of law and not merely of precepts which have only a persuasive value but no legal validity. (3) The safeguards to be enumerated in the bill of rights, with a few exceptions to be considered in the fourth chapter, should operate as limitations on the powers of not only the Federal government but also upon the powers of the governments of the constituent units.

In the second chapter I shall discuss at some length how the due process of law clauses of the Fifth and Fourteenth Amendments to the United States Constitution have worked in practice and what lessons the experience of their working holds out for us. In the third chapter I shall deal with the contract clause of the United States Constitution, in order to determine whether that provision is, or is not, suitable for adoption into the new Constitution of India.

CHAPTER II

THE DUE PROCESS CLAUSES IN THE UNITED STATES CONSTITUTION

Introductory

There are two clauses, one forming a part of the Fifth Amendment, and the other a part of the Fourteenth Amendment, whose place in the pattern of American constitutional law is of the utmost importance. The clause in the Fifth Amendment which provides that 'no person shall be...... deprived of life, liberty or property, without due process of law' is a limitation upon the powers of the Federal Government only. The twin clause contained in the Fourteenth Amendment, namely, that no State shall 'deprive any person of life, liberty or property, without due process of law' is a limitation upon the powers of the constituent units of the Federal union. These provisions, to use the language of Mr. Justice Matthews in *Hurtado* v *California*[1] are intended to guarantee to every individual 'the very substance of individual rights to life, liberty, and property.' An endless stream of cases, in which litigants bring to the test of the judicial process Federal or State action as depriving them of their life, liberty or property without due process of law, keeps flowing into the Supreme Court of the United States. And in the domain of civil liberties, the work of that great tribunal in reviewing Federal or State action as contravening the requirements of due process is of the highest importance. I have already, in the first chapter, given some examples to illustrate the point that the contribution of the Supreme Court toward the establishment of a high and priceless tradition of liberty and free institutions in the land by its power of judicial review under the due process of law clauses of the Fifth and Fourteenth

1. (1884) 110 U.S. 516.

Amendments is of the highest order; and I shall give more of such examples later in this chapter. I feel convinced of the usefulness, nay the imperative necessity, of having clauses incorporated into the future Constitution of India assuring to every individual that his right to life and liberty will not be imperilled by any unreasonable, arbitrary, or capricious Federal or State action. But I am not in favour of giving any entrenched position to property rights. In the provision I am thinking of as suitable for incorporation into the future Indian Constitution, I would only provide that neither the Federation nor any State shall deprive any person of his life or liberty without due process of law but give no such assurance in respect of property rights. The reasons upon which I base my view that the due process of law clause suggested as suitable for incorporation into the future Indian Constitution should not extend to property rights will be mentioned in the paragraphs that follow.

II

General observations as to how the due process clauses, so far as they deal with property rights, have worked in the United States

I shall now formulate the views I have formed after an examination of the working of that portion of the due process of law clauses contained in the Fifth and Fourteenth Amendments as deal with property rights. Those views may be summarized as follows:

(1) The freedom of action of the legislatures to devise suitable economic controls to deal with the multifarious problems which so frequently arise in a highly-developed, complex and integrated economy such as that which exists in the United States today, has to some extent been hampered by the courts vetoing under their power of judicial review enactments designed to grapple with such problems.

(2) Although the proportion of legislative measures which have been set aside by the Supreme Court as contravening the due process clause by affecting property rights judged in

relation to the number of such measures challenged as invalid is not large, the general chilling effect of this kind of judicial censorship over legislative experimentation cannot be lightly passed over.

(3) The wisdom of the lodgement of a power in the courts to test the constitutional validity of Federal and State legislation involving property rights by so fluid and indefinite a standard as whether or not the impugned enactment is arbitrary, capricious, or unreasonable, is open to grave doubt. Judges are not expected to find, nor do they find, solutions for the economic problems of the day. That is a function which properly belongs to the legislatures. If the courts are given a general oversight over such legislation and if they have the power to nullify any enactment which strikes them as unreasonable or capricious and the courts also use this power freely, the consequences of such use of power may well prove disastrous. There is the great danger of the judges transforming their prejudices into legal dogmas. And it would be a very serious thing indeed for the courts to assume the responsibility of pronouncing upon the wisdom or reasonableness of legislative measures intended to deal with the economic problems of the day. Moreover, the uncertainty which will hang round legislative enactments generating legal rights and obligations if they are subjected to the test of due process, a most variable and uncertain test under any circumstance, is not in the best interests of the country.

(4) If, after having introduced a provision into the Constitution providing that no man shall be deprived of his property without due process of law, the courts make it a general rule to endorse as valid every piece of legislation challenged before them as not conforming to the requirements of due process, on the ground that the legislature concerned must be deemed to know what is good for the country, then judicial review becomes a costly time-consuming process of no value to anybody. But if, on the other hand, the courts begin to interfere freely with legislative enactments and set them aside as invalid on the ground that they are arbitrary, capricious, or unreasonable, the position becomes an intolerable one. I may say that the Supreme Court in exercising

its powers of judicial review over property legislation challenged as violating the requirements of due process has, on the whole, done a most difficult job with great restraint and circumspection. Great judges like Mr. Justice Holmes and Mr. Justice Brandeis have given a wide room for legislative experimentation and have taken great care to prevent their own conscious or unconscious prejudices to affect their judgement when litigants have attacked any legislative measure affecting property rights as transgressing the constitutional demands of due process. But the question is not whether judges use their powers wisely or unwisely in this matter as whether they are the proper custodians of this power. If legislatures enact unreasonable or arbitrary legislation, the remedy must be sought at the polls and not at the hands of the courts. The corrective of the action of a legislature in enacting unwise or arbitrary laws must come from the free play of public opinion operating in normal channels and finally getting crystallized in the periodical verdict of the electorate delivered at the polls and not be a corrective embodied in the judicial process.

(5) Judges are after all human and there is nothing strange if in the application of so variable and indefinite a test as due process they do not always agree. It has happened that several pieces of legislation have been declared invalid by the Supreme Court by a narrow majority of five judges against four. There are also instances of the court reversing its decision when either the personnel of the court has changed, or one or more judges have crossed over to the other side. Conservative judges still clinging to the doctrine of *laissez faire*, a doctrine which is out of tune with modern conditions, have not always been sympathetic towards legislative experiments designed to subject economic enterprise to governmental control in the public interest. The due process of law clauses have come in handy for such judges to veto economic legislation as an unreasonable interference with the freedom of private enterprise. In marking out the allowable limits of State control over business enterprises within the contours of the due process of law clauses, even so august a tribunal as the Supreme Court of the United States has not

always been successful and lawyers and legislators find it hard to make their way through the labyrinth of decisions which that court has rendered under these clauses. Decisions are not easily reconcilable and principles enunciated in one case seem to break down when sought to be applied to another. If the legislature has evolved economic controls in the public interest which are thought to be unjust or arbitrary, the courts are hardly the proper authorities to pronounce upon their wisdom or folly. In my view, all this goes to show that even in the United States it would be well if the courts were relieved of the responsibility of pronouncing upon the validity of legislative measures involving property rights by applying so capricious a standard as due process of law. Such a change would not only save the time of the courts but also relieve them of the burden of a task which is ill-adapted to the technique of judicial review. But the chances of any move to delete the word 'property' from the two due process clauses succeeding in the United States seem indeed slender, for the present at any rate. Constitutional provisions once they make their way into the fundamental document have the happy knack of perpetuating themselves and it is a Herculean task to dislodge them from their vantage positions. We in India must be on guard against the wholesale adoption of provisions taken from other constitutions, especially when they are limitations upon the powers of governments, without fully understanding how they have worked in practice. Moreover, in India, the idea that courts are competent to invalidate legislative enactments regulating property rights as capricious, arbitrary, or unreasonable, is a novel one, as till now legislatures in India have worked without any such judicial supervision.

(6) Examples can no doubt be given of the Supreme Court of the United States using its power of judicial review in this field to good purpose by setting aside patently unreasonable or arbitrary legislation dealing with property rights. But the problem must be viewed as a whole and not in sections, and so viewed it seems to me that it would not be wise to give any general supervisory powers to the courts in regard to legislative measures dealing with property rights.

(7) I should like to point out that I am not opposed to judicial review as an institution in constitutional law. Indeed, in my view, the power of judicial review in the domain of civil liberties is so precious that it must be allowed full play. I am in fact recommending the incorporation into the future Constitution of India of two clauses preventing the Federation as well as the States from depriving any person of his life or liberty without due process of law. Moreover, I do not see how it is possible for a Federal polity, with its dual system of government, to work properly without the courts having the power of declaring legislative acts, whether Federal or State, void, when they have transgressed constitutional limits. In the great case of *Marbury* v *Madison*[2] Chief Justice Marshall made out an unanswerable case for holding that the courts have the duty under a written Constitution operating as a paramount law of the nation to declare legislative acts challenged as repugnant to the Constitution to be void if they find the contention to have been made good. In exercising the powers of judicial review in this domain, the courts have to proceed with great care as the responsibility of holding a legislative act to be void is indeed a serious one. But it is a responsibility which cannot be shirked simply because the task is delicate and the issues involved are of a grave character. If the Federal and State legislatures constitute themselves as final judges of the limits of their own authority, there is bound to be endless confusion. No doubt, acute controversies may well arise as to whether the court's holding in a particular case is proper or not. Such controversies have in fact arisen at various times in the history of the United States. I shall not deal with those controversies here. A written Constitution with a delimitation of National and State authority cannot be made to operate successfully without the power of judicial review vesting in the courts to determine if the acts promulgated by them have kept within the bounds of constitutional authority. But there is no pressing need for giving to the courts the power to set aside legislative enactments as void on the mere ground that they appear to them to be arbi-

2. (1803) 1 Cranch. 137.

trary or unreasonable interferences with property rights. My own study of this problem has convinced me that more harm than good will result from any attempt to give a general control over property legislation to the courts.

To deal properly with even the more important of the controversies which have arisen under the due process of law clauses of the Fifth and Fourteenth Amendments would require the writing of a fair-sized legal book. I am not embarking upon any such venture here. But it seems to me only fair that I should give the reader a glimpse at least of the material upon which I have based the observations which I have made in the foregoing paragraphs.

III

Regulation of businesses affected with a public interest

Both corporations and individuals have sought to use the due process clause of the Fourteenth Amendment as a brake upon the employment of the State police power for the regulation in the public interest of business enterprises. I may point out that the expression 'State police power' which is frequently met with in American constitutional law is used to signify the power of the constituent States to pass legislation designed to further the health, morality, safety or general welfare of its citizens. A study of the attempts made by the Supreme Court to mark the permissible limits of the State police power for controlling business enterprises without contravening the due process of law clause of the Fourteenth Amendment is one of absorbing interest. Such a study brings out clearly the great difficulty of attempting a reconciliation between the claims of State police power with the requirements of due process of law.

(a) *Munn* v *Illinois.* In the great case of *Munn* v *Illinois*[3] Chief Justice Waite in a famous opinion which he delivered for the Supreme Court formulated the doctrine that when a person devotes his property to a use in which the public has an interest, his business ceases to be *juris privati*

3. (1876) 94 U.S. 113.

only and becomes one affected with a public interest which can be controlled by the State for the common good. The case concerned the validity of an Illinois statute of the year 1871 prescribing the maximum charges which could be charged by elevators in Chicago for the storage of grain. One of the principal grounds of attack against the statute was that its effect was to deprive the owner of the elevator of his property without due process of law contrary to the Fourteenth Amendment. Chief Justice Waite pointed out in the course of his judgement that it was customary in England, from time immemorial, and in America from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, inn-keepers, etc., and in so doing to fix the maximum charges to be made for services rendered, accommodations furnished and articles sold; and down to the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of use, of private property necessarily deprived an owner of his property without due process of law. The amendment had not changed the law in this particular; it simply prevented the States from doing that which would operate as deprivation. He then recalled the remark which Lord Chief Justice Hale had made two hundred years before in his treatise *De Portibus Maris,* that when property is 'affected with a public interest, it ceases to be *juris privati* only' and observed that this proposition had been accepted without objection as an essential element in the law of property ever since. The questions, therefore, for consideration were, whether the business of the operation of grain elevators in Chicago could be regarded as one affected with a public interest; and whether the statute could be considered as being directed to the protection of that interest. Both these questions were answered in the affirmative. Upon a consideration of all the relevant facts touching the grain elevator business in Chicago Chief Justice Waite held that it was clear that it was a business of great importance, as grain produced in the seven or eight great States of the west had to pass through these elevators on their way to four or five States on the eastern sea-board, that this business was controlled by fourteen elevators owned by about thirty persons in Chicago,

that they had established a virtual monopoly over the business, and that it was in the public interest to control the rates charged so that the elevators may not abuse their position.

As to the second question, Chief Justice Waite said: 'For our purposes we must assume that, if a state of facts exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency.....'

Mr. Justice Field wrote a vigorous dissenting opinion, which was concurred in by Mr. Justice Strong, in which he declared that if the law laid down by the majority of the court was to prevail then 'all property and all business in the State are held at the mercy of the majority of its legislature' and that the court's holding 'was subversive of the rights of private property, heretofore believed to be protected by constitutional guarantees against legislative interference.'

(b) *Difficulties of deciding when a business becomes affected with a public interest.* Although the doctrine laid down by the Supreme Court in the *Munn* case that when one devotes his private property to a use in which the public has an interest, it becomes 'affected with a public interest' and is amenable to State regulation in the common interests of society has been accepted as the governing principle in later cases, great difficulty has been felt in applying it to concrete situations. When does a business enterprise become clothed with a public interest? The answer to this question is no easy matter as judges have used language of the most indefinite character in such cases and the decisions themselves are not easily reconcilable. Five to four and six to three decisions have been the rule rather than the exceptions. Mr. Justice Sutherland in delivering the opinion of the Supreme Court in *Tyson and Bros.* v. *Banton*[4] frankly admitted that the court had not succeeded in establishing a concrete standard for judging when a business becomes 'affected with a public interest.' He observed in that case (p. 430):

4. (1927) 273 U.S. 418.

The authority to regulate the conduct of a business or to require a licence comes from a branch of the police power which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business, (*Chesapeake and Potomac Tel. Co.* v. *Manning*, 186 U.S. 238, 246) but exists only where the business or the property involved has become 'affected with a public interest.' This phrase, first used by Lord Hale 200 years ago (*Munn* v. *Illinois*, 94 U.S. 113, 126), it is true, furnishes at best an indefinite standard, and attempts to define it have resulted, generally, in producing little more than paraphrases, which themselves require elucidation. Certain properties and kinds of business it obviously includes, like common carriers, telegraph and telephone companies, ferries, wharfage, etc. Beyond these, its application not only has not been uniform, but many of the decisions disclose the members of the same court in radical disagreement. Its full meaning, like that of many other generalizations, cannot be exactly defined;—it can only be approximated.

In the same case Mr. Justice Holmes who wrote a dissenting opinion was even more outspoken, for he said (p. 446) : 'that the notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers.'

(c) *Wolff Packing Company case.* The court might hold that a business which is sought to be regulated by a legislative enactment is one which is affected with a public interest. Even so, that enactment is not out of the wood yet. The court must be satisfied not only that the business is clothed with a public interest but that the control devised by the legislature to deal with any aspect of that business in the public interest is reasonable. Here again we encounter a most variable standard in the application of which judges may find themselves in sharp disagreement. Chief Justice Taft in delivering the opinion of the Supreme Court in *Wolff Packing Co.* v. *Court of Industrial Relations*[5] observed (p. 539) :

To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may

5. (1923) 262 U.S. 522.

be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business.

In the case to which I referred in the previous paragraph, *Wolff Packing Co.* v. *Court of Industrial Relations,*[6] Chief Justice Taft speaking for the Court made an attempt to classify businesses clothed with a public interest under three categories. He observed (p. 535) :

Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes: (1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities. (2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills...... (3) Businesses which, though not public at their inception, may be fairly said to have arisen to be such, and have become subject in consequence to some governmental regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner, by devoting his business to the public use, in effect grants the public an interest in that use, and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner and to be entitled to protection accordingly.

No difficulty arises with regard to the first two categories of businesses. Under the first would doubtless come the businesses in which common carriers are engaged, whether they transport goods or persons by rail, motor, ships or aeroplanes, communication agencies, telegraph, telephone or radio, and public utilities which furnish water, light, gas or electricity.

6. (1923) 262 U.S. 522.

Under the second would be included inns, cabs and grist mills all of which have been subject to State control not only in England but also in the American colonies themselves for centuries. But the difficulty arises with regard to the third category. When does a business, which at its inception was not public, reach a condition in which it becomes a public one justifying regulation by the State? The cases upon this question do not give us any definite or concrete tests by which it may be answered. Chief Justice Taft in the *Wolff Packing* case asserted that the declaration by the legislature that the business was affected with a public interest was not conclusive of the question whether its attempted regulation on that ground was constitutional. The learned judge was forced to admit that it was 'very difficult under the cases to lay down a working rule by which readily to determine when a business has become "clothed with a public interest".'

Recent decisions of the court no doubt approach this question from a broader view but even so the problem bristles with difficulties and refinements. In the important case of *Nebbia* v. *New York*[7] Mr. Justice Roberts speaking for the Court observed (pp. 536-537) :

> It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U.S. 522, 535. The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest' and 'clothed with a public use', have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. But there can be

7. (1934) 291 U.S. 502.

no doubt that upon proper occasion and by appropriate measures the State may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells. So far as the requirement of due process is concerned, and in the absence of other constitutional restrictions, a State is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislative arm, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio.*

The broad approach adopted by the majority of judges in the *Nebbia* case, towards the problem of the validity of price-fixing regulations of a New York statute regulating the retail prices of milk, which resulted in the upholding of the legality of the enactment as not contravening the due process of law clause of the Fourteenth Amendment, is surely very welcome as indicating a liberal judicial outlook towards legislative experiments designed to remedy economic maladjustments. But the decision itself is not very helpful in resolving the question when a business becomes affected with a public interest. True that Mr. Justice Roberts for the court said that there was no closed class or category of businesses affected with a public interest; and that, upon proper occasion and by appropriate measures, a State may regulate a business in any of its aspects including the prices to be charged for the products or commodities it sold. One may well ask what is a 'proper occasion' and what is meant by 'appropriate measures'? The judgement yields no clear criteria by which these questions may be answered. He also says that if the laws passed have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the demands of due process of law are satisfied. This language is indefinite. By what means are we to test whether a particular law has or has not a reasonable relation to a proper legislative purpose? What is meant by 'arbitrary'? Let not the reader think that I am criticizing the learned judge for indulging in generalities. The crux of the problem is that it

simply does not admit of concrete or facile solutions. That is the reason why judges cannot lay down clear-cut principles in this matter.

My whole point is that judges should not be saddled with the responsibility of pronouncing upon the validity of economic legislation—whether Federal or State—affecting property rights, by the application of a test so fluid in character as due process of law. If judges differ whether a particular legislation does or does not conform to the requirements of due process, there is nothing for us to be surprised at. I shall give a few illustrations of how judges differ when concrete cases are put before them.

(*d*) *Tyson and Bro.* v *Banton.* The case of *Tyson and Bro.* v *Banton*[8] concerned the validity of a New York statute which (after declaring that the price of or charge for admission to theatres, etc., is a matter affected with a public interest and subject to State supervision) in order to safeguard the public against fraud, extortion, exorbitant rates, and similar abuses forbade the resale of any ticket or other evidence of the right of entry to any theatre, etc., 'at a price in excess of fifty cents in advance of the price printed on the face of such ticket or other evidence of the right of entry'. The appellant, Tyson & Bro., who was engaged in the business of reselling tickets of admission to theatres and other places of entertainment in the city of New York, brought an action against Banton, District Attorney of New York and others, challenging, inter alia, the provision aforesaid as depriving him of his property and liberty without due process of law. Mr. Justice Sutherland in acting as the spokesman for the majority said that a theatre was essentially a private enterprise, and that the attempt to regulate the prices to be charged by a ticket scalper, even though he may have the opportunity to practise fraud, would be a serious invasion of private property rights which were protected under the Fourteenth Amendment. Mr. Justice Sutherland in the course of his opinion observed (pp. 442-443) :

8. (1927) 273 U.S. 418.

It is urged that the statutory provision under review may be upheld as an appropriate method of preventing fraud, extortion, collusive arrangements between the management and those engaged in reselling tickets, and the like. That such evils exist in some degree in connexion with the theatrical business and its ally, the ticket broker, is undoubtedly true, as it unfortunately is true in respect of the same or similar evils in other kinds of business. But evils are to be suppressed or prevented by legislation which comports with the Constitution, and not by such as strikes down those essential rights of private property protected by that instrument against undue governmental interference. One vice of the contention is that the statute itself ignores the righteous distinction between guilt and innocence, since it applies wholly irrespective of the existence of fraud, collusion, or extortion (........) and fixes the resale price as well where the evils are absent as where they are present. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody, upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught.

Justices Holmes, Stone, Sanford and Brandeis dissented from the majority view. The former three wrote separate dissenting opinions. In the course of a vigorous opinion, Mr. Justice Holmes observed as follows (pp. 445-447) :

We fear to grant power and are unwilling to recognize it when it exists. The States very generally have stripped jury trials of one of their most important characteristics by forbidding the judges to advise the jury upon the facts (*Graham* v. *United States,* 231, U.S. 474, 480) and when legislatures are held to be authorized to do anything considerably affecting public welfare it is covered by apologetic phrases like the police power, or the statement that the business concerned has been dedicated to a public use. The former expression is convenient, to be sure, to conciliate the mind to something that needs explanation; the fact that the constitutional requirement of compensation when property is taken cannot be pressed to its grammatical extreme; that property rights may be taken for public purposes without pay if you do not take too much; that some play must be allowed to the joints if the machine is to work. But police power often is used in a wide sense to cover and, as I said, to apologize for the general power of the legislature to make a part of the community uncomfortable by a change. I do not believe in such apologies. I think the proper course is to recognize that a State legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular court may happen to entertain. Coming down to the case before us,

I think, as I intimated in *Adkins* v. *Children's Hospital,* 261 U.S. 525, 569, that the notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers. The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it. Lotteries were thought useful adjuncts of the State a century or so ago; now they are believed to be immoral and they have been stopped. Wine has been thought good for man from the time of the Apostles until recent years. But when public opinion changed, it did not need the Eighteenth Amendment, notwithstanding the Fourteenth, to enable a State to say that the business should end. *Mugler* v. *Kansas,* 123 U.S. 623. What has happened to lotteries and wine might happen to theatres in some moral storm of the future, not because theatres were devoted to a public use, but because people had come to think that way. But if we are to yield to fashionable conventions, it seems to me that theatres are as much devoted to public use as anything well can be. We have not that respect for art that is one of the glories of France. But to many people the superfluous is the necessary, and it seems to me that government does not go beyond its sphere in attempting to make life livable for them. I am far from saying that I think this particular law is a wise and rational provision. That is not my affair. But if the people of the State of New York speaking by their authorized voice say that they want it, I see nothing in the Constitution of the United States to prevent their having their will.

(*e*) *Ribnik* v *McBride.* In *Ribnik* v *McBride*[9] the Supreme Court was called upon to pronounce on the validity of a New Jersey Law which required every person operating an employment agency as defined by the statute to procure a licence from the Commissioner of Labour, which licence would only be granted after the person applying for it had given in his application a schedule of fees which he proposed to charge for his services and that schedule had been approved by the Commissioner. The schedule of the fees once approved could not be changed without the consent of the Commissioner; and that authority had also the power under the statute to refuse to issue or revoke any licence for any good cause shown within the meaning and purpose of the act. The plaintiff in error, Rupert

9. (1928) 277 U.S. 350.

Ribnik, filed an application for a licence to conduct an employment agency, after complying with all the requirements of the statute but his application was rejected by the Commissioner on the ground that the fees proposed to be charged in respect of certain permanent positions were excessive and unreasonable. The plaintiff after litigating the matter in the State courts brought the matter for decision by the Supreme Court of the United States. Mr. Justice Sutherland who spoke for the court adopted the reasoning of the *Tyson* case and held that the statute in question, so far as it attempted to fix the rate of charge for services rendered by an employment agency was concerned, was unconstitutional as contravening the Fourteenth Amendment. Mr. Justice Sutherland in his opinion for the court said (pp. 356-357) :

> The business of securing employment for those seeking work and employees for those seeking workers is essentially that of a broker, that is, of an intermediary. While we do not undertake to say that there may not be a deeper concern on the part of the public in the business of an employment agency, that business does not differ in substantial character from the business of a real estate broker, ship broker, merchandise broker, or a ticket broker. In the Tyson & Bro— United Theatre Ticket Offices Case, (*supra*), we declared unconstitutional an act of the New York Legislature which sought to fix the price at which theatre tickets should be sold by a ticket broker, and it is not easy to see how, without disregarding that decision, price-fixing legislation in respect of other brokers of like character can be upheld. An employment agency is essentially a private business. True, it deals with the public, but so do the druggist, the butcher, the baker, the grocer, and the apartment or tenement house owner and the broker who acts as intermediary between such owner and his tenants. Of course, anything which substantially interferes with employment is a matter of public concern, but in the same sense that interference with the procurement of food and housing and fuel are of public concern. The public is deeply interested in all these things. The welfare of its constituent members depends upon them. The interest of the public in the matter of employment is not different in quality or character from its interest in the other things enumerated; but in none of them is the interest that 'public interest' which the law contemplates as the basis for legislative price control.

Mr. Justice Stone wrote a dissenting opinion in which Mr. Justice Holmes and Mr. Justice Brandeis joined. In the course of his dissent Mr. Justice Stone observed (pp. 361-375):

I cannot say a priori that the business of employment agencies in New Jersey lacks the requisite 'public interest'. We are judicially aware that the problem of unemployment is of grave public concern; that the conduct of the employment agency business bears an important relationship to that larger problem and affects vitally the lives of great numbers of the population, not only in New Jersey but throughout the United States; that employment agencies, admittedly subject to regulation in other respects,......and in fact very generally regulated, deal with a necessitous class, the members of which are often dependent on them for opportunity to earn a livelihood, are not free to move from place to place, and are often under exceptional economic compulsion to accept such terms as the agencies offer. We are not judicially ignorant of what all human experience teaches, that those so situated are peculiarly the prey of the unscrupulous and designing......To say that there is constitutional power to regulate a business or a particular use of property because of the public interest in the welfare of a class peculiarly affected, and to deny such power to regulate price for the accomplishment of the same end, when that alone appears to be an appropriate and effective remedy, is to make a distinction based on no real economic difference, and for which I can find no warrant in the Constitution itself nor any justification in the opinions of this court. ......There may be reasonable differences of opinion as to the wisdom of the solution here attempted. These I would be the first to admit. But a choice between them involves a step from the judicial to the legislative field......That choice should be left where, it seems to me, it was left by the Constitution—to the States and to Congress.

(*f*) *Olsen* v *Nebraska*. The identical problem which confronted the judges in the *Ribnik* case in 1928 was raised again thirteen years later in *Olsen* v *Nebraska*[10] and a unanimous court speaking through Mr. Justice Douglas overruled the earlier decision. The *Olsen* case concerned the validity of a Nebraska statute limiting the amount of the fee which may be charged by private employment agencies, to ten per cent of the first month's salary or wages of the person for whom employment had been secured, which had been attacked as contravening the due process clause of the Fourteenth Amendment. The court ruled that the statute was in no way inconsistent with due process of law. Mr. Justice Douglas in upholding the validity of the statute observed as follows (pp. 244-245) :

10. (1941) 313 U.S. 236.

The drift away from *Ribnik* v. *McBride, supra*, has been so great that it can no longer be deemed a controlling authority. It was decided in 1928. In the following year this court held that Tennessee had no power to fix prices at which gasoline might be sold in the State. *Williams* v. *Standard Oil Co.*, 278 U.S. 235. Save for that decision and *Morehead* v. *Tipaldo*, 298 U.S. 587, holding unconstitutional a New York statute authorizing the fixing of women's wages, the subsequent cases in this Court have given increasingly wider scope to the price-fixing powers of the States and of Congress. *Tagg Bros.* v. *United States*, 280 U.S. 420, decided in 1930, upheld the power of the Secretary of Agriculture under the Packers and Stockyards Act to determine the just and reasonable charges of persons engaged in the business of buying and selling in interstate commerce livestock at a stockyard on a commission basis. In 1931, a New Jersey statute limiting commissions of agents of fire insurance companies was sustained by *O' Gorman* and *Young* v. *Hartford Fire Ins. Co.*, 282 U.S. 251. A New York statute authorizing the fixing of minimum and maximum retail prices for milk was upheld in 1934. *Nebbia* v. *New York*, 291 U.S. 502......In the same year [1937] *Townsend* v. *Yeomans*, 301 U.S. 441, upheld a Georgia statute fixing maximum warehouse charges for the handling and selling of leaf tobacco. Cf. *Mulford* v. *Smith*, 307 U.S. 38, *Currin* v. *Wallace*, 306 U.S. 1. The power of Congress under the commerce clause to authorize the fixing of minimum prices for milk was upheld in *United States* v. *Rock Royal Co-operative*, 307 U.S. 533, decided in 1939. The next year the price-fixing provisions of the Bituminous Coal Act of 1937 were sustained. *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381...... These cases represent more than scattered examples of constitutionally permissible price-fixing schemes. They represent in large measure a basic departure from the philosophy and approach of the majority in the *Ribnik* case. The standard there employed, following that used in *Tyson* and *Brother* v. *Banton*, 273 *U.S.* 418, 430 *et seq.*, was that the constitutional validity of price-fixing legislation, at least in absence of a so-called emergency, was dependent on whether or not the business in question was 'affected with a public interest'......It was said to be so affected if it had been 'devoted to the public use' and if 'an interest in effect' had been granted 'to the public in that use' *Ribnik* v. *McBride, supra*, p. 355. That test labelled by Mr. Justice Holmes in his dissent in the *Tyson* case (273 U.S at p. 446) as 'little more than a fiction', was discarded in *Nebbia* v. *New York, supra* pp. 531-539. It was there stated that such criteria 'are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices,' and that the phrase 'affected with a public interest' can mean 'no more than that an industry, for adequate reason, is subject to control for the public good.' (Id., p. 536).

(*g*) *Nebbia* v *New York*. The important case of *Nebbia* v *New York*[11] concerned the validity of a New York State statute passed in 1933, which had set up a Milk Control Board empowered to fix the prices of milk in various phases of the milk industry including the price to be charged by stores to consumers for consumption off the premises where sold. Under section 312 (e) of the Act it was made unlawful for a dealer not only to sell milk for a price which was less or more than the price fixed by the Board but also to adopt any method or device whereby milk was sold for a price less or more than such price whether by a discount, rebate, or a combined price for such milk together with another commodity or commodities, which was less or more than the aggregate of the prices for the milk and the price or prices for such other commodity or commodities, when sold separately.

In pursuance of the statutory authority given to it, the Board fixed nine cents as the price to be charged by a store for a quart of milk. Nebbia, the proprietor of a grocery store in Rochester, who had sold two quarts of milk and a 5-cent loaf of bread for eighteen cents had been prosecuted and convicted for contravening the Board's order. At the trial, the accused had contended that the statute and the Board's order constituted an infringement of the equal protection and due process of law clauses of the Fourteenth Amendment. But this plea had been overruled. The case came up on appeal to the Supreme Court and the question for decision was whether the Federal Constitution prohibited a State from so fixing the selling price of milk.

After an extensive investigation by a joint legislative Committee of the Senate and Assembly into the conditions which had brought about an abnormal decline of the price of milk to producers and the resultant effect of the low prices upon the dairy industry and the future supply of milk to the cities of the State, the legislature of New York State thought that the only safe remedy for a situation pregnant with serious

11. (1934) 291 U.S. 502.

consequences to the health and well-being of its citizens was to regulate through a Milk Control Board the prices in that industry. And the challenged enactment and order aforesaid were the fruits of a deliberate policy of the State adopted after careful consideration of all aspects of the milk industry.

Mr. Justice Roberts speaking for a majority of the Court upholding the statute and the Board's order observed as follows (pp. 523-539) :

Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest......The milk industry in New York has been the subject of long-standing and drastic regulation in the public interest. The legislative investigation of 1932 was persuasive of the fact that for this and other reasons unrestricted competition aggravated existing evils and the normal law of supply and demand was insufficient to correct maladjustments detrimental to the community. The inquiry disclosed destructive and demoralizing competitive conditions and unfair trade practices which resulted in retail-price cutting and reduced the income of the farmer below the cost of production. We do not understand the appellant to deny that in these circumstances the legislature might reasonably consider further regulation and control desirable for protection of the industry and the consuming public. That body believed conditions could be improved by preventing destructive price-cutting by stores which, due to the flood of surplus milk, were able to buy at much lower prices than the larger distributors and to sell without incurring the delivery costs of the latter. In the order of which complaint is made the Milk Control Board fixed a price of ten cents per quart for sales by a distributor to a consumer, and nine cents by a store to a consumer, thus recognizing the lower costs of the store, and endeavouring to establish a differential which would be just to both. In the light of the facts the order appears not to be unreasonable or arbitrary, or without relation to the purpose to prevent ruthless competition from destroying the wholesale-price structure on which the farmer depends for his livelihood, and the community for an assured supply of milk. But we are told that because the law essays to control prices it denies due process......We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. We think that the appellant is also right in asserting that there is in this case no suggestion of any monopoly or

monopolistic practice. It goes without saying that those engaged in the business are in no way dependent upon public grants or franchises for the privilege of conducting their activities. But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the State from correcting existing maladjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the State is incapable of directly controlling the price itself. This view was negatived many years ago. *Munn* v. *Illinois*, 94 U.S. 133. ......It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory......Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty. Tested by these considerations we find no basis in the due process clause of the Fourteenth Amendment for condemning the Agriculture and Markets Law here drawn into question.

Mr. Justice McReynolds wrote a dissenting opinion in the course of which he observed as follows (pp. 558-559) :

The statement by the court below that—'Doubtless the statute before us would be condemned by an earlier generation as a temerarious interference with the rights of property and contract......; with the natural law of supply and demand,' is obviously correct. But another, that 'statutes......aiming to stimulate the production of a vital food product by fixing living standards of prices for the producer, are to be interpreted with that degree of liberality which is essential to the attainment of the end in view,' conflicts with views of constitutional rights accepted since the beginning. An end although apparently desirable cannot justify inhibited means. Moreover, the challenged Act was not designed to stimulate production—there was too much milk for the demand and no prospect of less for several years; also 'standards of prices' at which the producer might sell were not prescribed. The legislature cannot lawfully destroy guaranteed rights of one man with the prime purpose of enriching another, even if for the moment, this may seem advantageous to the public. And the adoption of any 'concept of jurisprudence' which permits facile disregard of the Constitution as long interpreted and respected will inevitably lead to its destruction.

Then, all rights will be subject to the caprice of the hour; government by stable laws will pass.

Mr. Justice Van Devanter, Mr. Justice Sutherland and Mr. Justice Butler concurred in the dissenting opinion of Mr. Justice McReynolds.

(*h*) *Discretion of legislatures to control business enterprises should not be fettered by constitutional provisions.* The cases considered by me above show how eminent judges differ when they seek to apply the test of due process to concrete situations. Now the question arises whether it is wise to allow the fate of legislative experiments affecting property rights to depend upon so capricious a standard as due process. It seems to me that constitution-builders should be slow to introduce provisions which hamper the path of the legislatures to find solutions for the economic problems of the day. The discretion of the legislatures as to what business enterprises should be brought under State control in the public interest, and as to what extent measures of control should go, should not, in my opinion, be open to challenge or debate in a court of law.

(*i*) *Due process and rate regulation.* It may be pointed out that in *Munn* v *Illinois*[12] Chief Justice Waite had rejected the contention that what was reasonable compensation for utility services was a matter for judicial determination. He had ruled that it was not competent for the courts to review the reasonableness of rates fixed by legislatures. He had observed in that case:

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative function. As has already been shown the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge would be unreasonable......The controlling fact is the power

12. (1877) 94 U.S. 113.

to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common law rule, which requires the charge to be reasonable, is itself a regulation as to price......We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts.

This position was not long maintained. In *Chicago, Milwaukee and St. Paul Ry. Co.* v. *Minnesota*[13] Mr. Justice Blatchford delivering the opinion of the court declared that the statute of Minnesota which had given the power to the State Railroad Commission to fix transportation rates which were conclusive was unconstitutional and thus asserted the power of the courts to review the reasonableness of rates fixed by a State authority. He said:

The question of reasonableness of a rate of charge for transportation by a railway company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination.

Three members of the Court, Justices Bradley, Gray and Lamar, joined in a dissenting opinion. Mr. Justice Bradley who spoke for the minority said:

But it is said that all charges should be reasonable, and that none but reasonable charges should be exacted; and it is urged that what is a reasonable charge is a judicial question. On the contrary, it is pre-eminently a legislative one, involving considerations of policy as well as of remuneration, and is usually determined by the legislature, by fixing a maximum of charges in the charter of the company, or afterwards, if its hands are not tied by contract. If this maximum is not exceeded, the courts cannot interfere......Thus the legislature either fixes the charges at rates which it deems reasonable, or merely declares that they shall be reasonable; and it is only in the latter case, where reasonableness is left open, that the courts have jurisdiction of the subject. I repeat: when the legislature declares that the charges shall be reasonable; or, which is the same thing, allows the common-law rule to that effect to prevail, and leaves the matter there, then resort may

13. (1890) 134 U.S. 418.

be had to the courts, to inquire judicially whether the charges are reasonable. Then, and not till then, is it a judicial question. But the legislature has the right, and it is its prerogative, if it chooses to exercise it, to declare what is reasonable. This is just where I differ from the majority of the court. They say in effect, if not in terms, that the final tribunal of arbitrament is the judiciary, I say it is the legislature. I hold that it is a legislative function, not a judicial one, unless the legislature or the law (which is the same thing) has made it judicial......It is always a delicate thing for the courts to make an issue with the legislative department of the government, and they should never do so if it is possible to avoid it. By the decision now made we declare, in effect, that the judiciary, and not the legislature, is the final arbiter in the regulation of fares and freights of railroads and the charges of other public accommodations. It is an assumption of authority on the part of the judiciary which, it seems to me, with all due deference to the judgement of my brethern, it has no right to make......It is complained that the decisions of the board are final and without appeal. So are the decisions of the courts in matters within their jurisdiction. There must be a final tribunal somewhere for deciding every question in the world. All human institutions are imperfect—courts as well as commissions and legislatures. Whatever tribunal has jurisdiction, its decisions are final and conclusive unless an appeal is given therefrom. The important question always is, what is the lawful tribunal for the particular case? In my judgement, in the present case, the proper tribunal was the legislature, or the board of commissioners which it created for the purpose......It may be that our legislatures are invested with too much power, open, as they are, to influences so dangerous to the interests of individuals, corporations and society. But such is the constitution of our republican form of government, and we are bound to abide by it until it can be corrected in a legitimate way. If our legislatures become too arbitrary in the exercise of their powers, the people always have a remedy in their hands; they may at any time restrain them by constitutional limitations. But so long as they remain invested with the powers that ordinarily belong to the legislative branch of government, they are entitled to exercise those powers, amongst which, in my judgement, is that of the regulation of railroads and other means of intercommunication, and the burdens and charges which those who own them are authorized to impose upon the public.

No judge has ever put the case for the legislature being allowed full power either directly or through the agency of an expert commission constituted by it, to prescribe reasonable rates for public utilities (without the reasonableness of the rates so fixed being open to challenge in a court of law, except when the legislature itself has granted a power of

review) more clearly than Mr. Justice Bradley in the passage above cited. He protested that the view of the majority of the court had practically overruled the doctrine of *Munn* v. *Illinois* and other Granger cases that the regulation of railroad rates was a purely legislative and not a judicial function. But his view did not find favour with the majority of his colleagues. Indeed the doctrine is now firmly established that the question whether the rates fixed by a legislature prevent a fair return on the property invested in the business is a judicial question, and any attempt to debar an appeal to the courts is regarded as a deprivation of due process of law. The late Judge Charles M. Hough of the Second Circuit Court of Appeals in delivering the annual lecture under the Frank Irvine Foundation at Cornell University in 1918 said that it was from the *Chicago, Milwaukee* decision that he dated the flood of decisions under the due process clause. He said in the course of that lecture:

> It is from that decision that I date the flood. Justice Bradley was as usual right in intuition; the thought underlying the Granger doctrine was that the law-making power was not only solely empowered to establish law, but to declare the reasonableness thereof; the departure made in 1889, and settled soon after Bradley's death in the Texas Commission cases[14] practically arraigned legislators at the bar, and passed judgement *not*, mark you, on the justice or wisdom, but the *reason*, of what they had done, and 'reason' is another of those words as to which inclusion and exclusion are more appropriate than definition. It must be added that most men with difficulty discover reason in that which they firmly believe to be unjust, unwise and probably dishonest. This, however, was no revolution, except within the court, whose changing personnel soon contained in Mr. Justice Brewer a powerful reinforcement to the school of Field—his near kinsman. For the world at large, all that happened was that the Supreme Court joined hands with most of the appellate tribunals of the older States, and the legislatures had not only domestic censors, but another far away in Washington, to pass on their handiwork.[15]

(j) *Ascertainment of rate base of public utilities.* The valuation to be adopted for public utilities to find the rate

14. (1894) 154 U.S. 362.
15. Charles M. Hough, The lecture is printed under the title 'Due process of law—Today' in 32 *Harvard Law Review,* 218, p. 228.

base has given rise to acute judicial controversies. Mr. Justice Harlan speaking for the Supreme Court in *Smyth* v. *Ames*[16] had formulated the doctrine that a corporation must be allowed to make a fair return on a fair value of the property invested by it in the business, and that rates fixed by a commission which did not allow a fair return could be set aside as depriving the owner of his property without due process of law. He said (pp. 546-547) :

......the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.

The rule laid down in *Smyth* v. *Ames* in 1898 that reasonable rates must be founded upon an assessment of the present value of the utility has set rate-making tribunals a most difficult, time-consuming, and laborious job. And judicial review of all the elements which enter into the determination of reasonable rates has resulted in the slowing down of the pace of rate regulation. Mr. Robert H. Jackson who was then Attorney-General of the United States (and now Mr. Justice Jackson of the Supreme Court of the United States) discussing the difficulties involved in the application of the 'fair' rate on the 'fair' value doctrine in his book *The struggle for Judicial Supremacy* has observed :

16. (1898) 169 U.S. 466.

Judicial review of all of the facts entering into rates set by utility commissions has become an effective process for slowing down and obstructing effective regulation of public utilities. The Supreme Court holds that the utility must be permitted to earn a 'fair' rate on the 'fair value' of the capital invested. The 'value' of the investment, however, is not determined solely by the actual investment. Together with this figure the Court says the Constitution requires that there must be taken into account the amount which it would cost to reproduce the plant at the time when the rate is fixed. *St. Louis* and *O' Fallon R. Co.* v. *United States,* 279 U.S. 461. Contemplate for a moment the job of valuing, let us say, the New York Telephone Company. What incredible, lengthy, and hopeless hypotheses must be entertained. And this process is to be repeated every time a rate is set! It becomes impossible to establish a solid, adequately supervised, permanent valuation on the basis of sound accounting. Since due process required that the utility be allowed a fair return on a so-called present value which, at a time when price levels had been rising, was greater than the investment, it might be supposed that when price levels started downward the rate base could be reduced by use of a comprehensive index figure to chart the extent of the price decline. But the commissions learned that this was forbidden by the same clause of the Constitution. *West* v. *Chesapeake* and *Potomac Tel. Co.* 295 U.S. 662. After a time-taking, costly investigation into each item is completed, the Court then permits—may indeed compel—the matter to be examined anew in a trial before a judge. It may take from five to fifteen years to set a rate which when finally determined is already out of date; (See Brandeis J, on time consumed in valuation proceedings in *St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 73); many commissions have given up regulation and bargain for rates with the utilities; and the legislatures, harassed and defeated in their efforts at regulation, turn to public ownership and the 'yardstick'. 'Due process' seems to have come to mean 'undue process'.[17]

Mr. Justice Brandeis in his lucid concurring opinion in *South-western Bell Telephone Co.* v. *Public Service Commission*[18] criticized the 'fair value' method of determining the rate base which was formulated in *Smyth* v. *Ames* and advocated in its place the prudent investment value as the rate base, that is to say, the value of the utility should, under normal conditions, be fixed with reference to the capital honestly and prudently invested in the business. Recent deci-

17. Robert H. Jackson, *The Struggle for Judicial Supremacy,* (1941) pp. 51-2.

18. (1923) 262 U.S. 276.

sions of the Supreme Court have taken the line that the Constitution does not bind rate-making bodies to the use of any particular formula provided no arbitrary result is reached. In the *Federal Power Commission* v. *Natural Gas Pipeline Co.*[19] Mr. Chief Justice Stone observed (p. 586) :

> The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end.

In a joint concurring opinion in the same case, Justices Black, Douglas and Murphy pointed out that the Commission was free, if it so chose, to adopt the prudent investment as a rate base. They observed (p. 606) :

> As we read the opinion of the Court, the Commission is now freed from the compulsion of admitting evidence on reproduction cost or of giving any weight to the element of 'fair value'. The Commission may now adopt, if it chooses, prudent investment as a rate base—a base long advocated by Mr. Justice Brandeis. And for the reasons stated by Mr. Justice Brandeis in *the Southwestern Bell Telephone* case, there could be no constitutional objection if the Commission adhered to that formula and rejected all others.

And the majority opinion of the Supreme Court in the recent case of *Federal Power Commission* v. *Hope Natural Gas Co.*[20] in supporting the action of the Commission in adopting the 'actual legitimate cost' with certain adjustments as the basis for fixing value instead of 'reproduction cost new' and 'trended original cost' suggested as alternatives for the rate base may be regarded as a silent approval of the reasonableness of the prudent-investment basis of valuation of public utilities.

19. (1942) 315 U.S. 575.
20. (1944) 320 U.S. 591.

(*k*) *The word property must be deleted from the due process clauses.* It may be that recent dicta of the Supreme Court with respect to the determination of a proper rate base would give considerable latitude to utility commissions in this matter. But even so the doors of judicial review under the due process clauses of the Fifth and Fourteenth Amendments still remain fairly wide open. My own approach to this question may now be stated. As I would give the legislatures full freedom over public utility regulation, I would not introduce any provision in the Constitution which would enable the courts to call into question the action of either the legislatures or of bodies specially constituted by them. That is one more reason why I would strike off the word 'property' from the two due process of law clauses. The legislatures would even then be free, if they so desired, to vest by appropriate statutes, powers of judicial review even with respect to rate-making. For instance, the Natural Gas Act, 1938, makes specific provision for a limited power of judicial review of the Commission's rate orders. But powers of judicial review in such matters must be authorized by the legislature and not be grounded upon an omnibus constitutional provision acting as a general restraint upon the powers of the legislatures. Legislatures should be free to determine under what circumstances the orders of any authority to deal with utility regulation should be subject to judicial review and also how far that review should extend. After all, to use the phraseology of Mr. Justice Bradley, there must be a final tribunal somewhere for deciding every question in the world. In public utility regulation, there is no reason why commissions properly manned should not be the final tribunals. Not that such bodies will not commit mistakes. But even courts, as human institutions, are equally imperfect and equally prone to commit errors.

Upon a review of the salient features of this problem, I have reached the conclusion that the proposed due process of law clauses to be introduced into the future Constitution of India as a limitation on the powers of the Federation and the constituent units should not cover rights of property.

IV

DUE PROCESS CLAUSES AND LIBERTY

I would unhesitatingly support the inclusion of liberty in the proposed due process of law clauses, because the case for such inclusion appears to me to be an overwhelming one. But at the same time, the experience of the working of the two parallel provisions in the Constitution of the United States suggests the need for saving clauses which would prevent a Federal or a State law being open to challenge in a court of law as depriving a person of his liberty without due process of law on the mere ground that it interferes with his freedom of contract. The reasons upon which I rest my case for the incorporation of such saving clauses will be mentioned a little later.

(*a*) *The concept of liberty.* Liberty is a concept of multiple strands. Nobody at the present day would identify liberty merely with the right of an individual to be free from the physical restraint of his person. As a matter of fact, the Supreme Court of the United States has given a wide connotation to the word liberty and thrown its mantle of protection over many valuable human rights, when they have been placed in jeopardy by Federal or State action. For instance, Mr. Justice Peckham in his opinion for the Court in *Allgeyer* v. *Louisiana*[21] speaking of the scope of the word liberty occurring in the Fourteenth Amendment has said (p. 589) :

> The liberty mentioned in that amendment means, not only the right of the citizen to be free from the physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

21. (1897) 165 U.S. 578.

A more recent and perhaps a wider definition of liberty than Mr. Justice Peckham's in the *Allgeyer* case is the one which Mr. Justice McReynolds gave in his opinion for the Court in *Meyer* v. *Nebraska*[22] where he observed as follows (p. 399) :

> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by freemen.

As I have already pointed out in the first chapter, the Supreme Court has held that many of the fundamental rights, safeguarded by the first eight amendments against Federal action, are, though not explicitly mentioned in the Constitution as shielded from State interference, comprehended in the word 'liberty' occurring in the due process of law clause of the Fourteenth Amendment. Among the rights so recognized as included in the word 'liberty' are rights of free speech and expression, and the right of an accused to have a fair and impartial trial.

(*b*) *The need for a general clause safeguarding liberty.* I may state that in the bill of rights which I am suggesting as suitable for incorporation into the future Constitution of India, I am making specific provision for certain basic rights like freedom of speech and expression, freedom of worship, equal protection of the laws, the right of an accused to the assistance of counsel in criminal actions, the right to the issue of writs of habeas corpus, being safeguarded against abridgement or denial whether by State or Federal action. While a specific enumeration of some of the more important of an individual's basic rights will be made in the suggested Indian Bill of Rights,

22. (1923) 262 U.S. 390.

I feel that any attempt to enumerate with any degree of completeness all those human rights which may, at some time or other in the future, be expected to become the subject of attack by the Federation or a State would be to make the Bill of Rights unduly cumbersome, prolix and rigid. It will be wanting in that suppleness which alone can give vitality to an organism which must subserve the needs not only of this generation but of generations to come. Moreover it is very difficult, if not impossible, to foresee what all human rights may become the targets of attack say fifty or a hundred years hence and provide safeguards for them in a Constitution to be framed today. And it is also necessary to take note of the fact that the content of liberty is never constant. It is bound to change with time and circumstance. Notions of liberty may change from one generation to another. For all these reasons it would be wise for us not to make constitutional provisions safeguarding basic liberties either too rigid or too detailed. As Mr. Justice Benjamin N. Cardozo has observed:

I speak first of the Constitution, and in particular of the great immunities with which it surrounds the individual. No one shall be deprived of liberty without due process of law. Here is a concept of the greatest generality. Yet it is put before the courts *en bloc*. Liberty is not defined. Its limits are not mapped and charted. How shall they be known? Does liberty mean the same thing for successive generations? May restraints that were arbitrary yesterday be useful and rational and therefore lawful today? May restraints that are arbitrary today become useful and rational and therefore lawful tomorrow? I have no doubt that the answer to these questions must be yes......The content of constitutional immunities is not constant, but varies from age to age. 'The needs of successive generations may make restrictions imperative today, which were vain and capricious to the vision of times past.' 'We must never forget' in Marshall's mighty phrase, 'that it is a *constitution* we are expounding.' Statutes are designed to meet the fugitive exigencies of the hour. Amendment is easy as the exigencies change. In such cases, the meaning once construed, tends legitimately to stereotype itself in the form cast. A *constitution* states or ought to state not rules for the passing hour, but principles for an expanding future. In so far as it deviates from that standard, and descends into details and particulars, it loses its flexibility, the scope of interpretation

contracts, the meaning hardens. While it is true to its function, it maintains its power of adaptation, its suppleness and play.[23]

A general provision in the Constitution against deprivation of liberty without due process of law would buttress up the enumerated categories of liberty like the freedoms of speech and press, freedom of worship, freedom from illegal detention by providing for the issue of the writ of habeas corpus and freedom from discrimination by ensuring equal protection of the laws. And the judiciary mounting guard as a knight-errant in the domain of liberty can use the due process of law clause as an effective weapon to protect individuals from being deprived of their freedom by aggressive acts, wherever they might emanate and however protean may be the forms which they may assume.

That assaults upon an individual's freedom may take various forms is demonstrated by United States experience. And the invaluable protection given by American courts in limiting the scope of State action trenching upon a man's liberty by exercising their powers of judicial review under the due process clause can be illustrated by one or two examples. In *Pierce* v. *Society of Sisters*[24] the Supreme Court held that the attempt made by a statute of Oregon to compel children between the ages of eight and sixteen to attend a public school only, although the parent or guardian of a child wanted to have it educated in a private school of his own choice, was a contravention of the due process of law clause of the Fourteenth Amendment and was invalid. Mr. Justice McReynolds speaking for the court said that the Act 'unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control.' He pointed out that the child was not the mere creature of the State and that the 'fundamental theory of liberty upon which all governments in this Union repose excluded any general power of the State to standardize

23. Cardozo, *The Nature of the Judicial Process,* (1921) pp. 76-7, 82-4.

24. (1925) 268 U.S. 510.

its children by forcing them to accept instruction from public teachers only.'

The recent case of *Skinner* v *Oklahoma*[25] concerned the validity of an Oklahoma statute which sought to interfere with the fundamental right of an individual to marry and procreate. The Oklahoma statute provided for the sterilization by vasectomy or salpingectomy, of 'habitual criminals', a habitual criminal being defined as any person who, having been convicted two or more times in Oklahoma or any other State, of 'felonies involving moral turpitude', is thereafter convicted and sentenced to imprisonment in Oklahoma for such a crime. The Supreme Court held that the statute as applied to one who had been convicted once of stealing chickens and twice of robbery violated the equal protection of the laws clause of the Fourteenth Amendment. Mr. Justice Douglas delivering the opinion of the Court observed (p. 541) :

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.

In a concurring judgement in the same case, Chief Justice Stone stated that the real question in the case was not one of equal protection, 'but whether the wholesale condemnation of a class to such an invasion of personal liberty, without opportunity to an individual to show that his is not the type of case which would justify resort to it, satisfies the demands of due process.' The Chief Justice pointed out that although the petitioner had been given a hearing to ascertain whether sterilization was detrimental to his health, he had been given none to discover whether his criminal tendencies were of an inheritable type. Moreover, there was no reliable scientific

25. (1942) 316 U.S. 535.

data or evidence to prove that the criminal tendencies of any class of habitual offenders were universally or even generally inheritable. And it was clear in this case that the person who had been condemned to an irreparable injury in his person had not been afforded an opportunity to show that his criminal propensities were transmissible to his progeny. Such denial of opportunity was clearly denial of due process.

These examples show how valuable is the safeguard afforded by the due process of law clause when a man's liberty is placed in jeopardy.

(c) *Liberty and freedom of contract.* It should not be supposed, however, that the inclusion of the word liberty in the American due process of law clauses of the Fifth and Fourteenth Amendments has been an unmixed blessing. Indeed the word 'liberty' had come in handy, until a few years ago, for the courts, to veto certain types of social and economic legislation on the ground that such legislation had interfered with freedom of contract, a freedom which is supposed to be part of the guarantee of liberty vouchsafed by the due process of law clauses. The courts, till a few years ago, were disposed to elevate freedom of contract into a dogma and thus checkmate far-reaching social and economic experiments launched to remedy the maladjustments which naturally arise in the complicated present-day conditions of society. During recent years the Supreme Court has approached the problem of freedom of contract in modern society from a more reasonable angle. It has come to realize that the constitutional guarantee of liberty does not give a charter to individuals to regulate their contractual relationships in any manner they like, independent of all legislative control. In its recent decisions under the due process clauses, the Supreme Court has upheld the validity of legislative interferences with employer-employee contractual arrangements as being proper in the larger interests of society. But notwithstanding such decisions, the idea that freedom of contract is something sacred, which the legislatures should not interfere with, is still very much of a live force in American constitutional law.

The legislatures in India have so far worked without any external checks like due process of law being imposed to

limit their powers. And prudence should dictate that we in India should be careful in seeing that the provisions which are proposed to be introduced into the future constitution of India as limitations on the powers of Federal and State governments do not tie up their hands to make reasonable social and economic experiments. That is the reason why I propose adding a proviso to each of the suggested due process of law clauses making it impossible for litigants to challenge the validity of legislative measures adopted by the future Indian Legislatures as contravening the due process of law clause on the mere plea that they interfere with freedom of contract. I have so far referred in general terms to this subject. Now I shall go into details.

I shall first deal with legislation intended to prescribe maximum hours or minimum wages of employees in industrial establishments.

We have already noticed the definition which Mr. Justice Peckham speaking for the court in *Allgeyer* v *Louisiana*[26] gave to the word liberty occurring in the Fourteenth Amendment. There he pointed out that liberty, inter alia, comprehended the right of a person 'to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary or essential to his carrying out to a successful conclusion the purposes above mentioned.' This definition naturally means that the freedom of the individual to enter into contracts in relation to his calling is part of the liberty guaranteed to him under the Constitution. True enough that, ordinarily, both employer and employee should have full freedom to bargain for and agree upon the terms and conditions of employment. But at the same time, it does not seem reasonable to stretch the concept of individual liberty so far as to deny to the legislatures power to prescribe maximum hours or minimum wages in particular occupations. Strange as it may seem, that was precisely the attitude which the Supreme Court had taken up with respect to such legislation

26. (1897) 165 U.S. 578, p. 589.

in a number of earlier decisions which were all overruled some years back. That position had no doubt been vigorously contested by many eminent members of the court itself in powerful dissenting opinions. The doctrine is now firmly established that the legislative fixing of maximum hours and minimum wages of employees does not contravene due process of law.

(d) *Holden* v *Hardy.* In 1898 the Supreme Court in *Holden* v *Hardy*[27] upheld an Utah law establishing an eight hours' day for workmen employed in underground mines and in smelters for reducing or refining ores as a valid exercise of the State police power. Mr. Justice Brown speaking for the majority observed (pp. 395-397):

> The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction, or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employees, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts......The legislature has also recognized the fact, which the experience of legislators in many States has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labour as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgement, fairly exercised, would pronounce to be detrimental to their health or strength.

The important point to notice in this case is the court's appreciation of the position that there can be no absolute freedom of contract in modern society, that employers and employees do not bargain on equal terms and that the legislature has a responsibility to intervene in contracts of employment in appropriate cases. Unfortunately this liberal attitude did not survive for long.

(e) *Lochner* v *New York.* Seven years after this decision was pronounced, in 1905, the Supreme Court in the now

27. (1898) 169 U.S. 366.

famous case of *Lochner* v *New York*[28] set aside, as contravening the due process clause, a New York statute which limited the hours of labour in bakeries and confectionery establishments to not more than sixty hours in any one week or ten hours in any one day. Mr. Justice Peckham in delivering the opinion of the court condemning the enactment as an unreasonable interference with liberty of contract observed (pp. 56-61):

Is this a fair, reasonable, and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labour which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labour includes both parties to it. The one has as much right to purchase as the other to sell labour......The question whether this act is valid as a labour law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of a person or the right of free contract, by determining the hours of labour, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence or capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgement and of action. They are in no sense wards of the State. Viewed in the light of a purely labour law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labour does not come within the police power on that ground. It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract......Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labour to earn their living, are mere meddlesome interferences with the rights of the individual......'

28. (1905) 198 U.S. 45.

Justices Harlan, White, Day and Holmes dissented.

In the course of a vigorous dissenting opinion Mr. Justice Holmes observed (p. 75) :

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that State constitutions and State laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the post office, by every State or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.

Sir Frederick Pollock writing in volume XXI of the *Law Quarterly Review* criticizing the majority view in *Lochner* v *New York* said (p. 212) : 'The legal weakness of this reasoning, if we may say so, is that no credit seems to be given to the State legislature for knowing its own business, and it is treated like an inferior court which has to give affirmative proof of its competence.'

(f) *Muller* v *Oregon.* Then came the case of *Muller* v *Oregon*[29]. There the court sustained the validity of a statute of Oregon prohibiting the employment of any female in any mechanical establishment, or factory or laundry in the State, more than ten hours in one day. A feature of this case was a heavily-documented brief filed by Mr. Brandeis (later Mr. Justice Brandeis of the Supreme Court) as counsel appearing in support of the validity of the enactment, to show that both in the United States and in Europe a large number of enact-

29. (1908) 208 U.S. 412.

ments had been passed limiting the hours of work for women. That brief also contained a long list of extracts culled out from the reports of commissions, of inspectors of factories, and of committees tending to show that long hours of work were detrimental to the health of women, particularly in view of their physiological structure and functions. In fact, Mr. Justice Brewer in delivering the opinion of the court seemed to place strong reliance upon this factual data to uphold the constitutionality of the challenged statute. He said in the course of his opinion (pp. 420-423):

> The legislation and opinions referred to......may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil......That women's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigour of the race......Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained......For these reasons, and without questioning in any respect the decision in *Lochner* v. *New York*, we are of opinion that it cannot be adjudged that the act in question is in conflict with the Federal constitution......

(g) *Bunting* v *Oregon*. The distinction which was sought to be made in the *Muller* case by Mr. Justice Brewer that the regulation of the maximum hours of work for women stood upon a different footing from that for men was given up in *Bunting* v *Oregon*[30] (1917), where Mr. Justice McKenna, in sustaining the validity of an Oregon statute limiting the

30. (1917) 243 U.S. 426.

hours of employment of all persons, whether man or woman working in any mill, factory or manufacturing establishment, by-passed the *Lochner* case. Chief Justice White and Justices Van Devanter and McReynolds dissented, but no dissenting opinion was filed.

(h) *Adkins* v *Children's Hospital.* In 1923, the case of *Adkins* v *Children's Hospital*[31] was decided by the Supreme Court. The question involved there was the validity of a Federal Minimum Wage Act which had authorized the setting up of a Board to fix, after an investigation, minimum wages for women in the various occupations in the District of Columbia with a view to enable them to maintain themselves in good health and also to protect their morals. The statute forbade employers from employing any women at wages lower than those permitted by the Board. The Children's Hospital, which employed several women at less than the minimum wage, brought an action to restrain the Board from enforcing its wage orders on the ground that it violated the due process clause of the Fifth Amendment. Mr. Justice Sutherland, delivering the opinion of the court, held that the statute in question was bad mainly upon two grounds, namely, first that it furnished no reliable standard for the guidance of the Board to fix minimum wages, and second that it was a serious interference with a contract of employment which was part of the liberty of the individual protected by the due process clause of the Fifth Amendment. Mr. Justice Sutherland observed as follows (pp. 554-557):

> It forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequences may be to oblige one to surrender a desirable engagement, and the other to dispense with the services of a desirable employee......The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of

31. (1923) 261 U.S. 525.

his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. Within the limits of the minimum sum, he is precluded, under penalty of fine and imprisonment, from adjusting compensation to the differing merits of his employees.

Chief Justice Taft and Justices Holmes and Sanford dissented, the two former filing separate dissenting opinions. Mr. Justice Holmes in the course of his dissenting opinion observed as follows (pp. 568-570):

The earlier decisions upon the same words in the Fourteenth Amendment began within our memory and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, Liberty of Contract, Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word 'liberty'. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts. Without enumerating all the restrictive laws that have been upheld I will mention a few that seem to me to have interfered with liberty of contract quite as seriously and directly as the one before us. Usury laws prohibit contracts by which a man receives more than so much interest for the money that he lends. Statutes of frauds restrict many contracts to certain forms. Some Sunday laws prohibit practically all contracts during one-seventh of our whole life......I confess that I do not understand the principle on which the power to fix a minimum for the wages of women can be denied by those who admit the power to fix a maximum for their hours of work......This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirements of health and right living.

(i) *Morehead* v *Tipaldo*. So late as the year 1936, in *Morehead* v *Tipaldo*[32] Justice Butler speaking for a majority of the Supreme Court held, following the *Adkins* case, that the minimum wage law of the State of New York was invalid as contravening the Fifth Amendment. Chief Justice Hughes wrote a dissenting opinion in which Justices Brandeis, Stone and Cardozo joined. Justice Stone also wrote a separate dissenting opinion.

32. (1936) 298 U.S. 587.

(j) *West Coast Hotel Co.* v *Parrish.* In 1937, in the case of *West Coast Hotel Co.* v *Parrish,*[33] Chief Justice Hughes speaking for a majority of the court in sustaining the validity of an Act of the State of Washington entitled 'Minimum wages for women' which authorized the fixing of minimum wages for women and minors, overruled the *Adkins* case. He said in the course of his opinion (pp. 389-399):

We are of the opinion that this ruling of the State court demands on our part a re-examination of the *Adkins* case. The importance of the question, in which many States having similar laws are concerned, the close division by which the decision in the *Adkins* case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the State must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration......The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the States, as the due process clause invoked in the *Adkins* case governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute or uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process......With full recognition of the earnestness and vigour which characterize the prevailing opinion in the *Adkins* case, we find it impossible to reconcile that ruling with these well-considered declarations. What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of State power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature of the State was clearly entitled to consider

33. (1937) 300 U.S. 379.

the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The legislature was entitled to adopt measures to reduce the evils of 'the 'sweating system,' the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living thus making their very helplessness the occasion of a most injurious competition. The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection.

Justice Sutherland wrote a dissenting opinion which was concurred in by Justices Van Devanter, McReynolds and Butler.

(k) *United States* v *Darby Lumber Co.* And recently, the Fair Labour Standards Act, 1938 enacted by Congress which provides for a nation-wide compulsory Federal regulation of wages and hours in industries producing goods for foreign or interstate commerce was upheld in *United States* v *Darby Lumber Co.*[34] as consistent with the Fifth Amendment. Chief Justice Stone, delivering the opinion of a unanimous court, observed (p. 125):

Both provisions are minimum wage requirements compelling the payment of a minimum standard wage with a prescribed increased wage for overtime of 'not less than one and one-half times the regular rate' at which the worker is employed. Since our decision in *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, it is no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment. Nor is it any longer open to question that it is within the legislative power to fix maximum hours. *Holden* v *Hardy*, 169 U.S. 366; *Muller* v *Oregon*, 208 U.S. 412; *Bunting* v *Oregon*, 243 U.S. 426......

(l) *Need for qualifying the word 'liberty' in the due process clauses.* In the United States the notion that the range of governmental supervision over human affairs should be strictly limited is a deeply rooted one. The origin of this concept of the proper place of government in society goes back

34. (1941) 312 U.S. 100.

to the days of the establishment of the Constitution of the United States when the individualistic philosophy enjoyed great vogue. It was thought in those days that the best way to promote man's liberty was to withdraw all governmental restraints and controls. But present-day society has become highly complex and integrated thanks mainly to the conditions brought about by modern scientific and industrial advance. And to allow individuals to do what they like with their wealth and business opportunities without public supervision would be to invite certain disaster.

When governmental regulations are introduced, business interests naturally think of means of escape from the grip of such regulations. And the due process of law clauses in the Constitution of the United States have, in many instances, afforded such interests avenues of escape from governmental supervision. I have already suggested the dropping out of the word 'property' from the due process of law clauses before they are introduced into the future Constitution of India as limitations upon the powers of the future Indian Federal and State Governments, as the presence of that word in those clauses would give a handle to vested interests to bar the application of governmental controls. Experience of the working of the due process of law clauses in the United States suggests that even the word 'liberty', unless properly qualified, may be similarly used to defeat governmental controls in the economic domain. In many of the cases challenging the constitutionality of enactments, Federal as well as State, the argument that the impugned legislation not only amounts to deprivation of property but also constitutes deprivation of liberty has been employed, and sometimes with great success. The particular facet of liberty which has served this purpose is the idea of freedom of contract. For instance, in attacking price-fixing legislation, the contention usually advanced is, that to interfere with the right of an owner to fix a price at which his property may be sold or used would not only deprive him of his property but also deprive him of his freedom of contract, which is regarded as inherent in the notion of liberty.

In some of the earlier cases the Supreme Court had evolved the doctrine that the sale of ordinary commodities of trade cannot be deemed to be so affected with a public interest as to justify legislative regulation of their prices. For instance, Mr. Justice Sutherland, in delivering the opinion of the Court in *Tyson & Bros.*, v *Banton*,[35] had observed (p. 438):

> Nor is the sale of ordinary comodities of trade affected with a public interest so as to justify legislative price fixing. This Court said in *Wolff Co.* v *Industrial Court, supra,* page 537 : 'It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation'......From the foregoing review it will be seen that each of the decisions of this court upholding governmental price regulation, aside from cases involving legislation to tide over temporary emergencies, has turned upon the existence of conditions, peculiar to the business under consideration, which bore such a substantial and definite relation to the public interest as to justify an indulgence of the legal fiction of a grant by the owner to the public of an interest in the use.

It is no doubt true that in the *Nebbia* case, which I have considered already, Mr. Justice Roberts for the Court tried to dispel the impression that there is 'something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that however able to regulate other elements of manufacture or trade, with incidental effect upon price, the State is incapable of directly controlling the price itself.' It is true also that he gave a wide definition of what constitutes a business affected with a public interest. Even so, there are passages in his opinion which make it difficult to lay down exactly under what circumstances the prices of commodities can be regulated by the State without contravening the requirements of due process. 'Price control', he said, 'like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.' Certain

35. (1927) 273 U.S. 418.

difficulties suggest themselves. When does price control become *arbitrary*? What are the limits of the *policy* which the legislature is free to adopt? The opinion of the court does not provide answers to these questions.

From what I have said in the foregoing paragraphs, I believe I have made the position clear, that if the due process of law clauses stand unqualified, legislative price-fixing during peace time might come to a head-on collision with the constitutional rock of liberty and come to grief in that process. Price control during war time stands on a separate footing and is clearly justified by the war power of the Federal Government as the recent case of *Yakus* v *United States*,[36] where the validity of the Emergency Price Control Act, 1942 was upheld, demonstrates. It appears to me that governmental price-fixing will be widely used in many countries including India for the purpose of stabilizing economic conditions in a disturbed post-war economy. I do not see why such controls should not be employed both in the interests of the producer and the consumer. It is easily conceivable that the prices of agricultural staples like rice and wheat and certain types of cotton and woollen goods and other essential commodities will be controlled in India, in the interests of both the producer and the consumer, even after the war has come to an end. A due process of law clause which is not carefully framed might easily be used to nullify such price-fixing legislation. This is an additional argument not only for omitting 'property' from the due process of law clauses, but also to qualify the word 'liberty', so that legislation interfering with freedom of contract may not be attacked as contravening the guarantee of liberty made by the Constitution.

36. (1944) 321 U.S. 414.

CHAPTER III

THE CONTRACT CLAUSE IN THE UNITED STATES CONSTITUTION

I

INTRODUCTORY

The Constitution of the United States contains a clause embodied in Article I, Section 10, providing, that 'no State shall.........pass any law impairing the obligation of contracts.' This provision, which is addressed to the legislatures of the several States, restrains them from passing enactments which would lead to the impairment of contractual obligations. It may be pointed out that the Constitution does not contain any comparable express provision circumscribing the powers of Congress with respect to contractual rights.

The object back of this clause was the preservation of the principle of the inviolability of contracts. The States were prevented by the insertion of this clause from passing legislation which would impair contractual obligations contracted in good faith by parties. Chief Justice Marshall delivering the opinion of the Supreme Court in *Sturges* v. *Crowninshield*[1] referred to the background of this clause in these terms:

> A general dissatisfaction with the lax system of legislation which followed the war of our revolution undobtedly directed the mind of the convention to this subject. It is probable, that laws such as those which have been stated in argument, produced the loudest complaints, were most immediately felt. The attention of the convention, therefore, was particularly directed to paper money, and to acts which enabled the debtor to discharge his debt, otherwise than was stipulated in the contract. Had nothing more been intended, nothing more would have been expressed. But in the opinion of the convention, much more remained to be done. The same mischief might be effected by other means. To restore public confidence completely, it was necessary, not only to prohibit the use of particular means by which it might be effected, but

1. (1819) 4 Wheat. 122.

to prohibit the use of any means by which the same mischief might be produced. The convention appears to have intended to establish a great principle, that contracts should be inviolable. The Constitution, therefore, declares, that no State shall pass 'any law impairing the obligation of contracts'.

II

GENERAL OBSERVATIONS ON THE WORKING OF THE CONTRACT CLAUSE

After a careful consideration of the pros and cons of the proposal to include in the future Constitution of India a contract clause as a restraint upon the powers of the States, I have reached the conclusion that we would do well not to incorporate such a clause. I shall summarize my own views upon this matter as follows:

(1) A broad provision of this kind preventing the States from passing laws impairing the obligations of contracts, if strictly enforced, would seriously cripple their powers. Chief Justice Marshall in his famous opinion for the Court in *Dartmouth College* v *Woodward*[2] has observed:

On the first point, it has been argued that the word 'contract' in its broadest sense, would comprehend the political relations between the government and its citizens, would extend to offices held within a State, for State purposes, and to many of those laws concerning civil institutions, which must change with circumstances, and be modified by ordinary legislation; which deeply concern the public, and which, to preserve good government, the public judgement must control. That even marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause in the Constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its broad, unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a State, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions, which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That as the framers of the Constitution could never have intended to insert in that instrument, a provision so unnecessary, so

2. (1819) 4 Wheat. 518.

mischievous, and so repugnant to its general spirit, the term 'contract' must be understood in a more limited sense.

The clause itself, which is so broadly worded, affords no guidance as to what categories of contract alone come within the constitutional interdiction. Nor does it give any yardstick by which to measure when contractual obligations are impaired within the meaning of the constitutional provision. Naturally, the courts have had a most difficult task to perform in adjusting State legislative power to the requirements of the constitutional prohibition against impairment of contracts. Questions under the contract clause constantly keep coming to the Supreme Court for decision . As Chief Justice Hughes in *Home Building and Loan Association* v. *Blaisdell*[3] has observed (p. 429) :

> The inescapable problems of construction have been: What is a contract? What are the obligations of contracts? What constitutes impairment of these obligations? What residuum of power is there still in the States, in relation to the operation of contracts, to protect the vital interests of the community? Questions of this character, 'of no small nicety and intricacy, have vexed the legislative halls, as well as the judicial tribunals, with an uncounted variety and frequency of litigation and speculation'. Story, Const. Section 1375.

Some of these questions will be considered by me when I deal with cases under the contract clause. The point which I wanted to make at this stage was, merely, that the courts have been set the most difficult task of working out a reasonable adjustment between State legislative power and the limitation contained in the contract clause so that the States are left with an adequate residuum of authority to safeguard the economic structure upon which the good order of society rests. After all, a State does not exist only to protect contracts from impairment. Its chief function is to secure the greatest happiness of the largest number. As Chief Justice Hughes has said in *Home Building and Loan Association* v. *Blaisdell*[4] : 'The policy of protecting contracts against impairment presupposes

3. (1934) 290 U.S. 398.
4. (1934) 290 U.S. 398, p. 435.

the maintenance of a government by virtue of which contractual relations are worth-while,—a government which retains adequate authority to secure the peace and good order of society.'

(2) While the work of the Supreme Court in striking a reasonable balance between State legislative power and the constitutional prohibition against impairment of contractual obligations is deserving of the highest admiration and praise, one cannot help feeling that the energies of that august tribunal in dealing with the construction of this clause might be more usefully employed for other types of judicial work by striking out this provision from the constitutional document. Judicial interpretation of this clause has permitted the State legislatures to exercise a wide measure of authority under their eminent domain and police powers, even though the action taken may plainly interfere with contractual obligations. A number of principles have been evolved by the Supreme Court to mark the boundaries of legitimate State action affecting contractual rights, without trespassing upon the limitations supposed to be embodied in the contract clause. The formulation of such principles, with later modifications, has been going on ever since Chief Justice Marshall wrote the opinion of the court in the case of *Fletcher* v. *Peck*.[5] And that process will continue, so long as the contract clause forms a part of the United States Constitution. True, great principles have already been evolved in regard to the interpretation of this clause. But, even so, the voice of controversy is not hushed. There is still doubt upon many matters. And the application of established principles to concrete situations has given room for wide differences of opinion. One may ask, whether all this controversy is worthwhile, and whether it would not simplify matters, if the exercise of State legislative power in the United States is not tied down by any constitutional limitation such as that contained in the contract clause. It seems to me that it would be better on the whole to trust to the good sense of the legislatures not to interfere

5. (1810) 6 Cranch. 87.

with contractual rights, unless interference is imperatively called for in the interests of social order. And if any legislature misbehaves, a succeeding legislature could set matters right. The corrective of the action of the legislature in the domain of economic legislation must be found, I think, in the free play of public opinion and not be a corrective embodied in the judicial process.

(3) Although the courts have, by their construction of this clause, allowed a wide-enough scope for legislative experimentation, it cannot be denied that the clause, even as interpreted today, still ties the hands of the State legislatures in certain matters. I shall give two instances to illustrate what I mean. For example, although the principle has been well established that the powers of eminent domain and the police power cannot be contracted away by a legislature, it is equally firmly established that the taxing power could be parted with by one legislature so as to bind its successors. It has been held, for instance, that a State may, by a contract based upon a consideration, exempt the property of an individual or a corporation from taxation, either for a specified period or even permanently, and that such an arrangement cannot be altered by subsequent legislative action as it would amount to an impairment of the obligation of contract in violation of the constitutional interdiction, *Piqua Branch of State Bank of Ohio* v *Knoop*[6]; *Home of the Friendless* v *Rouse*.[7] One can easily imagine what will be the reactions, on the future financial position of a State, of a wide-spread policy adopted by a foolhardy or unscrupulous legislature granting permanent tax exemptions to rich corporations or individuals, when the contract clause bars the repeal or modification of such arrangements by succeeding legislatures. As the decisions now stand, the hands of succeeding legislatures are effectively bound. As we shall see later, the correctness of this position has been contested by very eminent members of the Supreme Court itself. But the doctrine itself appears to be firmly established

6. (1853) 16 How. 369.
7. (1869) 8 Wall 430.

in the United States. I may also point out, that State legislatures are considerably hampered in affording suitable reliefs to harassed debtors at a time of depression, when money is scarce and values have fallen, because of the paralysing influence of the contract clause. It is true, no doubt, as we shall see later that the courts have in recent times viewed such legislative experiments with sympathy, and have gone some distance in upholding the validity of such legislation, but the contract clause places barriers in the path of legislatures which no amount of legal or judicial ingenuity can dislodge.

(4) A question may be asked whether it is not possible to frame a contract clause, which, while giving adequate power to the State legislatures to deal with the economic and social problems of the day, would, nevertheless, act as a brake upon unreasonable legislative impairment of contractual obligations. It may be suggested that the drafting of such a clause may be made in the light of the principles established by the decisions of the Supreme Court in the construction of this clause. I believe that such a drafting venture is foredoomed to failure. In the first place, the principles laid down by the Supreme Court to mark the limits of permissible State action affecting contractual rights do not lend themselves to crystallization in the form of definite clauses suitable for incorporation into a Constitution. Even if one were to succeed in drafting such à provision, containing a series of clauses and provisoes, there is no guarantee that it will mark an improvement upon the present position. It may well prove to be as fruitful a source of litigation as the provision which it replaces. Indeed, the chances are, that the new provision will give rise to more legal conundrums than the old one.

(5) We must remember that not only British Indian provincial legislatures but also Indian States legislatures have so far worked without any restrictions being imposed upon their powers with regard to contractual obligations. And I think, on the whole, there has been no complaint, that they have unreasonably interfered with contractual obligations. When they have interfered, it has been so for good reasons. Enactments to relieve the pressure upon agricultural debtors, who had been hit hard by a widespread economic depression,

were adopted by many legislatures throughout India some years back. No doubt such legislation involved impairment of contractual obligations; but few would deny the beneficent character of such legislative measures. Unless the case for the insertion of a contract clause in the future Indian Constitution is a strong one, such a clause should not find a place in it. And my own study of this question in the light of the experience available with regard to the working of the contract clause in the Constitution of the United States leads me to the conclusion that the disadvantages far outweigh the advantages which are likely to accrue from such a provision.

So far I have referred to the contract clause in general terms. But it seems to me to be worthwhile to give the reader an idea of the manifold and complex problems which have confronted State legislatures and judicial tribunals under the contract clause. Any adequate treatment of this topic would hardly fit in within the narrow compass of this work. It certainly requires a book in itself. My object here is a modest one. And all that I propose to do here is to refer to a few of the problems which have arisen under the contract clause.

III

The Dartmouth College Case

We may begin the study of the contract clause with the famous case of *Dartmouth College* v *Woodward*[8] in which Chief Justice Marshall wrote one of his most celebrated opinions. In the year 1769, King George III granted a charter incorporating twelve persons therein mentioned by the name of 'The Trustees of Dartmouth College', granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees who were to govern the Dartmouth College, the power to fill up vacancies in their own number. In 1816, the legislature of New Hampshire passed certain acts amending the original charter in certain respects, and among the alterations so made were, the increase

8. (1819) 4 Wheat. 518.

in the number of trustees from twelve to twenty-one, the power being given to the executive of the State to appoint the additional members, and the establishment of a board of overseers empowered to inspect and control the more important of the functions of the trustees. This board was to consist of twenty-five persons, the president of the Senate, the Speaker of the House of Representatives of New Hampshire, and the Governor and Lieutenant-Governor of Vermont being ex-officio members, and the rest being nominated by the Governor and Council of New Hampshire. The majority of the trustees functioning under the old king's charter refused to accept the amended charter and brought an action for the recovery of the corporate property which had been taken possession of by a person deriving his authority from the later enactments hereinbefore adverted to.

It is unnecessary to probe into the local controversies which had been going on for a long time with respect to the control over the college, enmeshed as they were in the tangled web of State politics, personal animosities and religious differences. The main issue presented by the case was a broad one: Whether the charter granted to the college amounted to a contract, the terms of which may not be modified by the State legislature, having regard to the constitutional bar raised by the contract clause against legislative impairment of contractual obligations. Chief Justice Marshall held that the charter amounted to a contract and that the challenged enactments had impaired the contract. He observed in the course of his opinion (pp. 627-652):

> It can require no argument to prove, that the circumstances of this case constitute a contract. An application is made to the Crown for a charter to incorporate a religious and literary institution. In the application, it is stated, that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely, in this transaction every ingredient of a complete and legitimate contract is found......If the act of incorporation be a grant of political power, if it create a civil institution, to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in the transactions, the subject is one in which the

legislature of the State may act according to its own judgement, unrestrained by any limitation of its power imposed by the Constitution of the United States. But if this be a private eleemosynary institution, endowed with a capacity to take property, for objects unconnected with government, whose funds are bestowed by individuals, on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds, in the manner prescribed by themselves; there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause. Those who are no longer interested in the property may yet retain such an interest in the preservation of their own arrangements, as to have a right to insist, that those arrangements shall be held sacred. Or, if they have themselves disappeared, it becomes a subject of serious and anxious inquiry, whether those whom they have legally empowered to represent them forever may not assert all the rights which they possessed, while in being; whether, if they be without personal representatives, who may feel injured by a violation of the compact, the trustees be not so completely their representatives, in the eye of law, as to stand in their place, not only as respects the government of the college, but also as respects the maintenance of the college charter......This is plainly a contract to which the donors, the trustees and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties......The opinion of the court, after mature deliberation, is, that this is a contract, the obligation of which cannot be impaired, without violating the constitution of the United States......We next proceed to the inquiry, whether its obligation has been impaired by those acts of the legislature of New Hampshire, to which the special verdict refers ......On the effect of this law, two opinions cannot be entertained...... The whole power of governing the college is transferred from trustees, appointed according to the will of the founder, expressed in the charter, to the executive of New Hampshire. The management and application of the funds of this eleemosynary institution, which are placed by the donors in the hands of trustees named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the State. The will of the State is substituted for the will of the donors, in every essential operation of the college. This is not an immaterial change.

Mr. Justice Washington and Mr. Justice Story wrote separate concurring opinions.

The principle established by the *Dartmouth College* case was a far-reaching one, namely, that the States had no power to revoke or amend charters granted to private corporations, that term covering not only charitable corporations like the

Dartmouth College but also ordinary business corporations like banks and railroads. Charters whose object was the creation of a political or administrative unit, such as a municipal corporation, did not enjoy the privileged position accorded to the charters of private corporations, and were subject to repeal and amendment by succeeding legislatures. No doubt, the enunciation of the principle of inviolability of corporate charters, gave a fillip to corporate enterprise. But at the same time, it established corporations in an entrenched position beyond the reach of State regulatory power. Had Chief Justice Marshall's decision remained unqualified, the States would have been placed in a sorry plight, helpless spectators of corporation omnipotence. But the States have been retrieved from this unenviable position by the courts having engrafted upon the doctrine of the *Dartmouth College* case other principles to which I shall call attention in the succeeding paragraphs.

Mr. Justice Story in his concurring opinion in the *Dartmouth College* case had referred with approval to the principle enunciated by the Massachusetts Court in the case of *Wales* v *Stetson*,[9] 'that the rights legally vested in a corporation cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose had been reserved to the legislature in the act of incorporation.' This principle meant that, if a corporate charter had been granted with a special reservation that it was subject to future legislative repeal or amendment, the said reservation became an essential condition of the contract contained in the charter, and no question would then arise of the constitutional restriction upon any State law impairing the obligation of contracts when the reserved power was exercised either for repeal or amendment of the charter. The practice of incorporating reservation clauses into corporation charters has become a common device. In cases in which corporations are created under a special act of the legislature, the act of incorporation will itself contain a reservation of the right of amendment or repeal by future statutes. Where corporations are chartered under the general

9. (1806) 2 Mass. 143.

law, which is the practice now widely used, the law itself provides that the charters granted under it are subject to legislative amendment or repeal. There are certain States whose Constitutions themselves make that reservation. But whatever may be the process by which the right to amend or repeal is reserved, a State is now in a position to maintain control over its corporation charters.

IV

The Charles River Bridge Case

In the famous case of *Charles River Bridge* v *Warren Bridge* [10] Chief Justice Taney laid down the important principle that public grants like corporate charters should be strictly construed so that the grantee got nothing more than what was clearly given and any doubt or ambiguity in the grant should operate against the grantee and in favour of the public. The question arose in this way. In 1650, the legislature of Massachusetts granted to the President of Harvard College, the right to dispose of the ferry over the Charles River from Charlestown to Boston. The college enjoyed the proceeds accruing from the ferry until 1785, when the legislature incorporated 'The Proprietors of the Charles River Bridge' authorizing the company to install a bridge in place of the ferry. The new company under its charter was empowered to receive tolls of the Bridge and was made liable to the payment of an annual sum to the Harvard College for the impairment of the value of its ferry franchise. In 1828, the legislature incorporated another company called 'The Proprietors of the Warren Bridge', with authority to construct another bridge in close proximity to the Charles River Bridge. The new Bridge was, under the terms of the Charter, to become a toll-free bridge within a short period, as, by the terms of the charter, the Warren Bridge was to be surrendered to the State as soon as the tolls received reimbursed the proprietors of the expenses incurred in constructing and maintaining the

10. (1837) 11 Peters 420.

Bridge, the period of surrender not exceeding in any case beyond six years from the time they began to collect tolls. The proprietors of the older bridge, faced with the prospect of losing revenue by the construction of a bridge which was destined soon to become toll-free, brought an action for an injunction to restrain the new company from constructing the bridge on the ground that the statute authorizing its construction impaired the obligation of the contract between them and the Commonwealth of Massachusetts. The proprietors of the old bridge attacked the statute of 1828 on two grounds: (1) That by virtue of the grant made in 1650, Harvard College was entitled, in perpetuity, to the exclusive right of keeping a ferry between Charlestown and Boston, and that these rights on the establishment of a bridge in place of the ferry under the Charter of 1785, became vested in 'the Proprietors of the Charles River Bridge', the rights of the bridge company in that line of travel being as exclusive as that of the ferry. (2) That even independently of the ferry right, the act of the legislature of 1785, upon its true construction, necessarily implied, that the legislature would not permit the creation of another Bridge, especially a toll-free bridge, in the same line of travel.

With regard to the first contention, Chief Justice Taney delivering the opinion of the court held that, even assuming that the Harvard College had been granted exclusive ferry rights, there was nothing in the act of incorporation of the Charles River Bridge Company to show that the legislature intended to grant exclusive rights to that company, simply because such rights had been conferred on the Harvard College. Chief Justice Taney observed (pp. 543-544):

> Neither can the extent of the pre-existing ferry right, whatever it may have been, have any influence upon the construction of the written charter for the bridge. It does not, by any means, follow that because the legislative power in Massachusetts, in 1650, may have granted to a justly favoured seminary of learning, the exclusive right of ferry between Boston and Charlestown, they would, in 1785, give the same extensive privilege to another corporation, who were about to erect a bridge in the same place. The fact that such a right was granted to the college cannot, by any sound rule of construction, be used to extend

the privileges of the bridge company beyond what the words of the charter naturally and legally import. Increased population, longer experience in legislation, the different character of the corporation which owned the ferry from that which owned the bridge, might well have induced a change in the policy of the State in that respect; and as the franchise of the ferry and that of the bridge are different in their nature, and were each established by separate grants, which have no words to connect the privileges of the one with the privileges of the other; there is no rule of legal interpretation which would authorize the courts to associate these grants together, and to infer that any privilege was intended to be given to the bridge company, merely because it had been conferred on the ferry. The charter to the bridge is a written instrument which must speak for itself, and be interpreted by its own terms.

Dealing with the second contention, the learned judge adopted the rule of construction applicable to the construction of such statutes in England, which was expressed as follows in the case of the *Proprietors of the Stourbridge Canal* v *Wheeley and others,* 2 B & Ad. 793 :

The canal, having been made under an act of Parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases, is now fully established to be this— that any ambiguity in the terms of the contract must operate against the adventurers, and in favour of the public, and the plaintiffs can claim nothing that is not clearly given them by the act.

Adopting this rule of construction, which was well-established in England, Chief Justice Taney held that no exclusive privilege was given to the Charles Bridge, and that there was no engagement by the State that it would not sanction the establishment of another bridge over the Charles River.

V

Blair v Chicago

Mr. Justice Day, in delivering the opinion of the Supreme Court in *Blair* v *Chicago,*[11] explained the scope of this rule of construction in these words (pp. 471-472):

11. (1906) 201 U.S. 400.

Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privileges may be intelligently granted or purposely withheld. It is a matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed......Since the decision in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, this court has had frequent occasion to apply and enforce the doctrine that a grant of rights in public property accepted by a beneficiary will amount to a contract entitled to a protection against impairment by action of the State, or municipalities acting under State authority. Concurrent with this principle, and to be considered when construing an alleged grant of this character, is the equally well established rule, which requires such grants to be made in plain terms in order to convey private rights in respect to public property, and to prevent future control of such privileges in the public interest.

VI

The Contract Clause and the State Police and Eminent Domain Powers

Another well-established principle is that a State cannot by the grant of a charter or otherwise part with its eminent domain or police powers. The preservation of these powers is so essential to the proper functioning of a State that no contract made by a State can lawfully bargain away either of these vital powers. Some illustrations of this principle will be given in the paragraphs that follow.

(a) *Boston Beer Co.* v *Massachusetts*. In 1828, the legislature of Massachusetts had granted a charter to the Boston Beer Company authorizing it to manufacture malt liquors. In 1869 the legislature enacted a prohibition law. Proceedings having been taken under this act for the forfeiture of liquors which the Beer Company was transporting with the intent to sell them in violation of law, the company taking its stand on the contract clause, contended, that the law as applied to its business, impaired the obligation of the contract contained in its charter. Mr. Justice Bradley, delivering the opinion of the Supreme Court in *Boston Beer Co.* v *Massachu-*

setts,[12] held that all rights are held in subordination to the police power of the State, and that if the public safety or the public morals require discontinuance of the manufacture of or traffic in liquor, the hand of the legislature cannot be stayed. A legislature cannot, by any contract, divest itself of the power to provide for the preservation of good order safety or public morals, of the people under its care.

(b) *Stone* v *Mississippi*. The legislature of Mississippi had, in 1867, passed an Act granting a charter to a corporation with power to conduct a lottery for a period of 25 years, subject to the payment of an annual sum and a fixed percentage of the proceeds of the sale of its tickets. A new State constitution adopted in 1869 prohibited lotteries and the sale of lottery tickets; and in 1870, a statute was passed to enforce this prohibition. Proceedings were then taken by the Attorney-General of the State against Stone and other officers of the company alleging that they were conducting a lottery in contravention of the law aforesaid. The case reached the Supreme Court and is reported as *Stone* v *Mississippi*.[13] Chief Justice Waite in delivering the opinion of the Court observed as follows :

> All agree that the legislature cannot bargain away the police power of a State......Many attempts have been made in this court and elsewhere to define the police power, but never with entire success...... No one denies, however, that it extends to all matters affecting the public health or the public morals......Neither can it be denied that lotteries are proper subjects for the exercise of this power......The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty......Certainly the right to stop them is governmental, to be exercised at all times by those in power, at their discretion.

(c) *Illinois Central Road Co.* v *Illinois*. We may take the very interesting case of *Illinois Central Railroad Co* v

12. (1878) 97 U.S. 25.
13. (1880) 101 U.S. 814.

Illinois[14] to illustrate the difficulties which arise in the application of the contract clause. It also illustrates the danger of placing constitutional limitations on the exercise of legislative power. No doubt, the majority of the court in this case took a practical view of the matter and decided against the corporation. But three learned judges, led by Mr. Justice Shiras, dissented.

The case arose in this way. In 1869, the legislature of the State of Illinois had granted in fee simple to the Illinois Central Railroad Company, its successors and assigns, the State's right and title to about one thousand acres of submerged land under Lake Michigan along the harbour front of Chicago. The grant included all the lands under the waters of the outer harbour and a large area besides. In 1873 the legislature repealed the grant. In 1883 the State of Illinois through its Attorney-General filed a suit against the Central Railroad Company for the determination of the rights of the parties to the submerged lands under the acts aforesaid. Mr. Justice Field in delivering the opinion of the Court held that the earlier legislative grant of the ownership of the harbour and the lands under it was invalid and was revocable. In the course of his opinion he observed as follows:

> The act, if valid and operative to the extent claimed, placed under the control of the railroad company nearly the whole of the submerged lands of the harbour, subject only to the limitations that it should not authorize obstructions to the harbour or impair the public right of navigation, or exclude the legislature from regulating the rates of wharfage or dockage to be charged. With these limitations the act put it in the power of the company to delay indefinitely the improvement of the harbour, or to construct as many docks, piers and wharves and other works as it might choose, and at such positions in the harbour as might suit its purposes, and permit any kind of business to be conducted thereon, and to lease them out on its own terms, for indefinite periods ......The question, therefore, to be considered is whether the legislature was competent to thus deprive the State of its ownership of the submerged lands in the harbour of Chicago, and of the consequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters by the grant, against any

14. (1892) 146 U.S. 387.

future exercise of power over them by the State......It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and water remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbour or bay, or of a sea or a lake......Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time. Undoubtedly there may be expenses incurred in improvements made under such a grant which the State ought to pay; but, be that as it may, the power to resume the trust whenever the State judges best is, we think, incontrovertible. The position advanced by the Railroad Company in support of its claim to the ownership of the submerged lands and the right to the erection of wharves, piers and docks at its pleasure, or for its business in the harbour of Chicago, would place every harbour in the country at the mercy of a majority of the legislature of the State in which the harbour is situated. We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbour of a great city and its commerce have been allowed to pass into the control of any private corporation. But the decisions are numerous which declare that such property is held by the State, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbour and of the lands under them is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining...... We hold, therefore, that any attempted cession of the ownership and control of the State in and over the submerged lands in Lake Michigan, by the act of April 16, 1869, was inoperative to affect, modify or in any respect to control the sovereignty and dominion of the State over the lands, or its ownership thereof, and that any such attempted operation of the act was annulled by the repealing act of April 15, 1873, which to that extent was valid and effective. There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it.

(d) *West River Co.* v *Dix.* That a State cannot contract away by charter its right of eminent domain was decided

so far back as 1848 in *West River Co.* v *Dix.*[15] In 1795 the legislature of Vermont incorporated the West River Bridge Company and conferred upon it the exclusive privilege of erecting and maintaining a toll bridge over the West river, within four miles from the place where it united with the Connecticut river, for a period of one hundred years. The bridge was constructed and operated as a toll bridge till 1839. In that year, the State legislature passed a general act giving power to the Supreme and County courts of the State the power 'to take any real estate, easement, or franchise of any turnpike or other corporation, when, in their judgement, the public good requires a public highway,' and to pay compensation. Under the authority granted by this act, the West River Bridge was converted into a free bridge as part of a public highway. The Bridge company attacked the condemnation proceedings as an infringement of the charter rights guaranteed by the Contract Clause. Mr. Justice Daniel, delivering the opinion of the Supreme Court disallowing the contention of the Bridge company, held that the power of eminent domain was paramount to all private rights, which were necessarily held in subordination to this power and that the franchise rights of a bridge company were no more sacred than other property rights.

VII

THE CONTRACT CLAUSE AND THE STATE TAXING POWER

Curiously enough, although the courts have held that the exercise of State police power and the eminent domain power cannot be resisted by the contract clause, the taxing power enjoys no such privileged position. Indeed, the doctrine is well-established, that if a State legislature were to grant a tax exemption, for a consideration, whether for a definite period or even in perpetuity, to a corporation or an individual, no succeeding legislature can interfere with that arrangement as such interference would amount to an impairment of

15. (1848) 6 How. 507.

the obligation of a contract in contravention of the contract clause of the Constitution, *Piqua Branch of the State Bank of Ohio* v *Knoop*.[16] *Home of the Friendless* v *Rouse*.[17] The argument generally advanced in support of this view is, that although taxation is necessary for the support of government, it is not a part of government itself. As Mr. Justice McLean put it in the *Piqua Branch* case, the contention that a State 'in exempting certain property from taxation, relinquishes a part of its sovereign power is unfounded.'

As I have already pointed out, this doctrine has been well-settled. Even so, one may well contest the correctness of this position. The taxing power is a valuable part of the sovereign power of a community and if this power is mutilated by a foolish or a corrupt legislature by wide-spread tax exemptions granted in perpetuity for inadequate considerations, the consequences to the future well-being of the State may prove well-nigh disastrous. If the preservation of the police and the eminent domain powers is considered as essential for the proper functioning of a State, it stands to reason that the taxing power should also be similarly protected. Eminent judges of the Supreme Court have argued in favour of the abandonment of the present doctrine. For instance Mr. Justice Miller in the course of a powerful dissent in *Washington University* v *Rouse*[18] observed as follows:

> We do not believe that any legislative body, sitting under a State constitution of the usual character, has a right to sell, to give, or to bargain away forever the taxing power of the State. This is a power which, in modern political societies is absolutely necessary to the continued existence of every such society......To hold, then, that any one of the annual legislatures can, by contract, deprive the State forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is strictly lawful. It cannot be maintained that this power to bargain away, for an unlimited period, the right of taxation, if it exists

16. (1853) 16 How. 369.
17. (1869) 8 Wall. 430.
18. (1869) 8 Wall. 439: A common dissenting opinion covering this case and another case *Home of the Friendless* v. *Rouse* (1869) 8 Wall. 430 was filed by Mr. Justice Miller.

at all, is limited, in reference to the subjects of taxation. In all the discussion of this question, in this court and elsewhere, no such limitation has been claimed. If the legislature can exempt in perpetuity, one piece of land, it can exempt all land. If it can exempt all land, it can exempt all other property. It can, as well, exempt persons as corporations. And no hindrance can be seen, in the principle adopted by the court, to rich corporations, as railroads and express companies or rich men, making contracts with the legislatures, as they best may, and with such appliances as it is known they do use, for perpetual exemptions from all the burdens of supporting the government. The result of such a principle, under the growing tendency to special and partial legislation, would be, to exempt the rich from taxation, and cast all the burden of the support of the government, and the payment of its debts, on those who are too poor, or too honest to purchase such immunity......We content ourselves with thus renewing the protest against a doctrine which we think must finally be abandoned.

Mr. Chief Justice Chase and Mr. Justice Field concurred in the dissenting opinion of Mr. Justice Miller.

VIII

THE WIDE REACH OF THE CONTRACT CLAUSE

I have so far referred to some of the principles applicable to contracts between a corporation and a State. But contractual relations may be established not only between a corporation and a State, but also between an individual and a State, and also between States or between individuals. It is not possible to consider here the various problems which have arisen in connexion with the powers of a State to interfere with such contracts without transgressing the constitutional prohibition embodied in the contract clause. I shall be content to deal here only with one or two problems in order to call attention to the complexities of the subject and the delicacy of the task which the courts have been set under the contract clause to harmonize the constitutional prohibition with the State police power, so that the necessary residuum of power is available to maintain the peace and good order of society.

(a) *The contract clause and the marriage tie.* The question has arisen whether a State statute dissolving the marriage

tie violates the contract clause. The Supreme Court has held that it does not, the reason being that, although marriage is founded upon an agreement, marriage itself is a social institution, in the maintenance of which in its purity, the public is deeply interested, and therefore, its obligations and liabilities are controllable by the State in the larger interests of society, *Maynard* v *Hill*.[19]

(b) *The contract clause and State moratory legislation.* The contract clause has seriously curtailed the powers of the States to pass moratorium laws to afford relief to harassed debtors in a period of emergency. The case of *Bronson* v *Kinzie*[20] affords a striking example of the inability of a State legislature to give even a modicum of relief to debtors when money is scarce and debtors are unable to pay their debts except by disposing of their property at ruinous prices. The State of Illinois, during the period of acute economic depression which began in 1837 and continued for some years thereafter, passed two statutes, one providing that the equitable estate of the mortgagor shall not be extinguished for twelve months after a sale under a decree in chancery, and the other preventing the sale unless two-thirds of the appraised value of the property had been bid therefor. Chief Justice Taney held that both these acts so embarrassed and restricted the mortgagee's remedies that they were void as impairing the substantial rights of the mortgagee under his contract.

In the case of *Sturges* v *Crowninshield*[21] Chief Justice Marshall pointed out the distinction which existed between the obligation of a contract and the remedy given by the legislature to enforce that obligation. He said that the legislature was competent without impairing the obligation of a contract to modify the remedies. And in *Von Hoffman* v *Quincy*,[22] Mr. Justice Swayne in his opinion for the Court ruled that, while it was competent for the States to change the form of

19. (1888) 125 U.S. 190.
20. (1843) 1 How. 311.
21. (1819) 4 Wheat. 122
22. (1867) 4 Wall. 535.

the remedy, or to modify it in any other way, such change of form or modification of the remedy would be valid provided only that 'no substantial right secured by the contract is thereby impaired.' He also observed: 'No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances.' In view of the conflicting judicial precedents upon State moratory legislation, the path of the legislative draftsman is strewn with difficulties.[23]

The Supreme Court was called upon some years back to pronounce upon the constitutionality of a Minnesota Moratorium law in the important case of *Home Building and Loan Association* v *Blaisdell*.[24] The majority of the court upheld the validity of the State law, though four judges led by Mr. Justice Sutherland dissented. The facts of this case in outline were these. One Blaisdell, the owner of a residential property in Minneapolis had mortgaged it to the Loan Association. On default of payment of the debt, the mortgagee, acting under the terms of the mortgage which contained a valid power of sale by advertisement, had brought the property to sale and purchased it on 2 May 1932 for the sum of $3700·98. Under the laws in operation on the date the mortgage was made, the mortgagor's power to redeem the property was due to expire on 2 May 1933. Under the Minnesota Moratorium law, 1933, power was given to the district courts, upon a petition of the mortgagor, to extend the period of redemption, provided that the additional time fixed did not in any event extend beyond 1 May 1935, and provided also that during the period of extension the mortgagor was made to pay a reasonable sum by way of rent. This Act, as the preamble showed, was passed in view of the prevailing economic depression, which threatened real property owners

23. See the Article by A. H. Feller: *Moratory Legislation: A Comparative Study*, 46 *Harvard Law Review*, p. 1061.

24. (1934) 290 U.S. 398.

with the imminent peril of the loss of their properties through mortgage foreclosures for prices much below their real values. Blaisdell taking advantage of the provisions of this statute applied to the District Court of Hennepin County for an order extending the period of redemption from the foreclosure sale. The court found that the reasonable market value of the property was $6,000, that the mortgagee had purchased it for the full amount of the mortgage indebtedness namely $4,056·39 and that the reasonable rental value of the property was $40 a month. Upon the basis of these findings, the court entered its judgement extending the period of redemption to 1 May 1935, subject to the condition that the mortgagee should pay to the mortgagor $40 a month during 'the extended period from 2 May 1933, that is, that in each of the months of August, September and October 1933, the payments should be $80, in two instalments, and thereafter $40 a month, all these payments to go to the payment of taxes, insurance, interest, and mortgage indebtedness.'

The mortgagee contended that the effect of the moratorium law was to impair to a substantial extent the contractual obligations undertaken by the mortgagor. Chief Justice Hughes in the course of an elaborate opinion for the Court held that the contract clause should not be read with literal exactness like a mathematical formula and that it should bear a reasonable construction. He pointed out that the law did not seek to impair the integrity of the mortgage indebtedness; nor did it interfere with the validity of the foreclosure sale; all that it sought to do was to extend the period of redemption after making adequate provision for the payment of rent during the time the mortgagor was allowed to continue in occupation of the mortgaged premises. He followed this up with the following observations (pp. 445-447) :

Also important is the fact that mortgagees, as is shown by official reports of which we may take notice, are predominantly corporations, such as insurance companies, banks, and investment and mortgage companies. These, and such individual mortgagees as are small investors, are not seeking homes or the opportunity to engage in farming. Their chief concern is the reasonable protection of their investment security. It does not matter that there are, or may be, individual

cases of another aspect. The legislature was entitled to deal with the general or typical situation. The relief afforded by the statute has regard to the interest of mortgagees as well as to the interest of mortgagors. The legislation seeks to prevent the impending ruin of both by a considerate measure of relief......Although the courts would have no authority to alter a statutory period of redemption, the legislation in question permits the courts to extend that period, within limits and upon equitable terms, thus providing a procedure and relief which are cognate to the historic exercise of the equitable jurisdiction. If it be determined, as it must be, that the contract clause is not an absolute and utterly unqualified restriction of the State's protective power, this legislation is clearly so reasonable as to be within the legislative competency.

Mr. Justice Sutherland wrote a dissenting opinion in which Mr. Justice Van Devanter, Mr. Justice McReynolds and Mr. Justice Butler concurred. In the course of his opinion Mr. Justice Sutherland observed (pp. 482-483):

A statute which materially delays enforcement of the mortgagee's contractual right of ownership and possession does not modify the remedy; it destroys, for the period of delay, *all* remedy so far as the enforcement of that right is concerned. The phrase 'the obligation of a contract' in the constitutional sense imports a legal duty to perform the specified obligation of *that* contract, not to substitute and perform, against the will of one of the parties, a different, albeit equally valuable, obligation. And a State, under the contract impairment clause, has no more power to accomplish such a substitution than has one of the parties to the contract against the will of the other. It cannot do so either by acting directly upon the contract, or by bringing about the result under the guise of a statute in form acting only upon the remedy. If it could, the efficacy of the constitutional restriction would, in large measure, be made to disappear.

The point to be noticed with reference to this case, is, that the fate of a State moratorium law aiming at the very modest objective of allowing some breathing space to harassed mortgagors to save their properties from being irretrievably lost depended upon the precarious vote of a single judge. If one of the five who voted in favour of the validity of the statute had taken a different view, the result would have been exactly the opposite of what it was. The wording of the contract clause being what it is, nobody need feel surprised if judges differ when they are called upon to apply the provi-

sion to a particular set of facts. After all, this was a fairly innocuous law, not in any way interfering with the substantial rights of the parties secured under the contract of mortgage. There is no doubt that any attempt by a State law to modify contractual rights of a mortgagee in any material aspect, however pressing may be the need for such modification, would at once encounter the constitutional prohibition against the impairment of contractual obligations. One may well ask whether it is wise to tie the hands of State legislatures by such a constitutional provision. I for one would not place any such fetters on the powers of the State legislatures.

IX

Conclusion: There should be no contract clause in the Indian Constitution

For reasons which I have mentioned, I am of the opinion that no provision similar to the one contained in Article 1, Section 10 of the United States Constitution against impairment of contractual obligations by a State legislature should be introduced into the new Constitution of India.

CHAPTER IV

A DRAFT BILL OF RIGHTS FOR NEW INDIA

I

Introductory

In this chapter, I shall formulate the provisions which, in my view, ought to find a place in a Bill of Rights to be embodied in the new Constitution of India. Although the majority of the provisions which I have suggested as suitable for incorporation in the new Indian Constitution are modelled upon analogous provisions to be found in the United States Constitution, I may point out, that they have been suitably modified to meet Indian conditions and requirements. I have dropped many American provisions which I regarded as either unnecessary or unsuitable for incorporation into the Indian Constitution. I have suggested certain entirely new provisions, whose presence in the Indian Bill of Rights seemed to me to be worthwhile.

The plan which I have followed in this chapter is to set out the suggested provisions in the form of articles seriatim with comments to explain just why they have been put in and exactly what their scope will be. In Articles I to IV and VI to X, I have used the uniform nomenclature of 'State' to cover every constituent unit of the Indian Federation, a British Indian Province as well as an Indian State. Articles V and XI contain no reference to the Indian States. In the Twelfth Article, I have had to draw a distinction between a British Indian Province and an Indian State. In embodying these articles in the Constitution, it is suggested, that a general provision may be added, explaining, that in Articles I to IV and VI to X, the word 'State' means a constituent unit of the Federation, irrespective of whether it is a British Indian Province or an Indian State.

II

PROVISION FOR SAFEGUARDING FREEDOM OF SPEECH, PRESS AND ASSEMBLY

Article I: Neither the Federation nor a State shall make any law unreasonably abridging freedom of speech or of the press, or the right of the people peaceably to assemble for any reasonable purpose.

General. The wording of this Article is largely based upon the First Amendment to the United States Constitution. That amendment is a limitation upon the powers of Congress only, restraining that authority from making any law abridging freedom of speech or of the press or the right of peaceable assembly. There is no parallel constitutional provision preventing the States of the American union from enacting laws abridging those freedoms or that right. Even so, the Supreme Court of the United States, by the process of judicial interpretation of the word 'liberty' in the due process clause of the Fourteenth Amendment, has absorbed the freedoms of speech and press,[1] and the right of peaceable assembly, without which speech would be unduly trammelled,[2] in the concept of liberty, and protected them from unreasonable abridgement by the States. The provision as drafted now is intended to make the position clear that the restriction upon the promulgation of laws and regulations abridging the freedoms of speech and press or the right of peaceable assembly should operate not only on the Federation but also on the constituent units.

Freedom of speech and press not absolute. I have introduced the word 'unreasonably' into the draft provision in order to make it clear, that the constitutional restriction upon the passing of laws abridging freedom of speech and press or the right of peaceable assembly is not absolute, and that in proper circumstances, both the Federation and the States

1. *Gitlow* v. *New York* (1925) 268 U.S. 652; *Near* v. *Minnesota.* (1931) 283 U.S. 697.

2. *DeJonge* v. *Oregon* (1937) 299 U.S. 353; *Herndon* v. *Lowry* (1937) 301 U.S. 242.

would be competent to impose legislative restraints upon such freedom and that right, in the larger interests of society. But such laws to be constitutionally valid must be reasonable. The courts would have the responsibility when the validity of any law abridging freedom of speech or press or the right of peaceable assembly is challenged, to say whether the law is reasonable and should be upheld, or is unreasonable and should be set aside. To draw the line in this matter is of course not easy. As Mr. Justice Stone has said in a somewhat different context, drawing the line is 'a recurrent difficulty in those fields of the law where differences in degree produce ultimate differences in kind.'[3]

It may be pointed out that the guarantee of the First Amendment of the United States Constitution which says that Congress shall make no law abridging freedom of speech and press is expressed in rather broad terms. It is obvious that the constitutional guarantee for freedom of utterance, explicitly made by the First Amendment and recognized by judicial interpretation as impliedly included within the liberty guaranteed by the Fourteenth Amendment, cannot be an absolute one, as no well-ordered society can permit an individual to say without responsibility whatever he likes. In sustaining the validity of a conviction under the Espionage Act, 1917, Mr. Justice Holmes in *Frohwerk* v *United States*[4] said:

> With regard to that argument we think it necessary to add to what has been said in *Schenck* v. *United States,* 249 U.S. 47, only that the First Amendment, while prohibiting legislation against free speech as such, cannot have been, and obviously was not, intended to give immunity for every possible use of language. *Robertson* v. *Baldwin,* 165 U.S. 275, 281. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of murder within the jurisdiction of Congress would be an unconstitutional interference with free speech. Whatever might be thought of the other counts on the evidence, if it were before us, we have decided in *Schenck* v. *United States,* that a person may be convicted of a conspiracy to obstruct recruiting by words of persuasion.

3. *Harrison* v. *Schaffner* (1941) 312 U.S. 579, p. 583.
4. (1919) 249 U.S. 204, p. 206.

It has also been recognized in the United States that a State under its police power may restrain or punish the abuse of freedom of expression by utterances which are inimical to the public welfare or tend to corrupt public morals, or which incite to crime or disturb the public peace, or which urge the overthrow of organized government by force. As Mr. Justice Sanford in delivering the opinion of the Court in *Gitlow* v *New York*[5] has observed (pp. 666-670):

It is a fundamental principle, long established, that the freedom of speech and of the press, which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled licence that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom[6]......Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free government, without such limitation, it might become the scourge of the republic. That a State, in the exercise of its police power, may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace is not open to question......And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press, said Story, *supra*, does not protect disturbances of the public peace or the attempt to subvert the government......It does not protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the State......By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil, that they may be penalized in the exercise of its police power......We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of a State unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality.

These decisions make it clear that the freedom of utterance guaranteed under the Constitution of the United States

5. (1925) 268 U.S. 652.
6. Story, *on the Constitution* (5th Ed.) Section 1580, p. 634......

is not absolute; and that both the Congress and the States are competent, in the execution of their respective powers, to pass reasonable laws abridging that freedom. It seems to me, that, in drafting a new provision to be introduced into the Indian Constitution as a safeguard for freedom of speech and press, the legal position should be made clear that it is not every law, whether Federal or State, which abridges that freedom, that comes within the constitutional prohibition, but only such laws as unreasonably abridge this freedom that are within its purview.

The expression 'freedom of speech and press' is comprehensive enough to cover every mode of communication of ideas.

Importance of freedom of speech and press. The mental health and vigour of a society is to a considerable degree dependent upon the amplitude of the freedom which it allows its members to speak and write upon all problems in which they are interested. Truth, whether in the political, economic, or scientific sphere, can only emerge if free play is given to the impact of ideas. As Milton said in the *Areopagitica*: 'And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple, who ever knew Truth put to the worse, in a free and open encounter.'

Public discussion of political, social and economic problems being indispensable to the proper functioning of a modern government, it is imperative that every liberty-loving society should keep the channels of communication wide open to the free circulation of ideas. As Mr. Justice Black in his dissenting opinion in *Milk Wagon Drivers Union* v *Meadowmoor Dairies*[7] has well observed (pp. 301-302):

......I view the guarantees of the First Amendment as the foundation upon which our governmental structure rests and without which it could not continue to endure as conceived and planned. Freedom to speak and write upon public questions is as important to the life

7. (1941) 312 U.S. 287.

of our government as is the heart to the human body. In fact, this privilege is the heart of our government. If that heart be weakened, the result is debilitation; if it be stilled it is death.

Scope of the constitutional guarantee of free speech and free press. One may ask what exactly does the constitutional guarantee of freedom of speech and press such as the one suggested by me connote ? An endeavour will be made to answer this question in the light of the experience which is available with respect to the working of a parallel provision in the constitution of the United States, namely, the First Amendment. A word of caution must however be said. In view of the elusive nature of the subject, it is too much to expect that American experience will give us clear-cut guidance as to the bounds within which freedom of expression will enjoy constitutional immunity. All that we may reasonably expect from United States precedents is broad pointers as to how courts approach the delicate problem of reconciling the constitutional guarantee of freedom of expression with the requirements of public safety or social well-being.

I shall deal with specific problems later. In this context I propose to deal in a broad way as to what the constitutional guarantee of freedom of speech and press comprehends. Mr. Justice Murphy in his opinion for the Supreme Court in *Thornhill* v *Alabama* [8] has sketched the broad contours of the freedom of speech and press guaranteed by the Constitution by a few deft strokes (pp. 101-105):

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. The Continental Congress in its letter sent to the Inhabitants of Quebec (October 26, 1774) referred to the 'five great rights' and said: 'The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement

8. (1940) 310 U.S. 88.

of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.' *Journal of Continental Congress*, 1904 ed., vol. 1, pp. 104, 108. Freedom of expression, if it would fulfil its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period......Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public importance merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgement of the liberty of such discussion can be justified only where the clear danger of substantive evil arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.

A working principle which will meet a number of factual situations is that liberty of expression must be given full scope and should be curtailed only if and when there is a 'clear and present danger' that the utterance, if allowed, would harm society. To use the language of Mr. Justice Black in *Bridges* v *California*,[9] before utterances can be curtailed or punished the 'substantive evil must be extremely serious and the degree of imminence extremely high.' The phrase 'clear and present danger' was first used by Mr. Justice Holmes in his opinion for the Court in *Schenck* v *United States*.[10] The 'clear and present danger' test has found increasing judicial favour, as a working principle, in a variety of situations, where the scope of the constitutional protection of freedom of speech and press has been under debate. In two recent cases, *Thornhill* v *Alabama*[11] and *Bridges* v *California*[12] which I have considered later, the 'clear and present danger test' was accepted as the proper test to be applied in cases of this sort. Mr. Zecha-

9. (1941) 314 U.S. 252, p. 263.
10. (1919) 249 U.S. 47.
11. (1940) 310 U.S. 88.
12. (1941) 314 U.S. 252.

riah Chafee, Jr., in his book *Free Speech in the United States* says that 'the great interest in free speech should be sacrificed only when the interest in public safety is really imperilled, and not, as most men believe, when it is barely conceivable that it may be slightly affected.'[13]

Constitutional guarantee operative in war and peace. In the United States, the view has been accepted that the constitutional guarantee against abridgement of freedom of speech and press is operative both in war and peace, although in the context of war many things which may be said in time of peace may validly be forbidden. In the recent case of *Hartzel* v *United States*[14] Mr. Justice Reed in a dissenting opinion, while supporting the conviction of one Hartzel under section 3 of the Espionage Act of 1917, accepted as indisputable the position that the freedom of speech guaranteed against abridgement by the First Amendment is operative even during a time of war. He observed (p. 690) :

> The First Amendment to the Constitution preserves freedom of speech and of the press in war as well as in peace. The right to criticize the government and the handling of the war is not questioned. Congress has not sought, directly or indirectly to abridge the right of anyone to present his views on the conduct of war or the making of the peace. The legislation under which Hertzel was tried and convicted was aimed at those who, in time of war, 'shall wilfully cause or attempt to cause insubordination, disloyalty, or refusal of duty in the military or naval forces of the United States.' It is only when the requisite intent to produce those results is present that criticism may cross over the line of prohibited conduct. The constitutional power of Congress so to protect the national interest is beyond question. *Schenck* v. *United States,* 249 U.S. 47.

The United States Espionage Act, 1917. In 1917, Congress enacted the Espionage Act dealing mainly with subjects like actual espionage, the protection of military secrets and other kindred matters. That statute contained two sections, namely sections 3 and 4 of Title I, which it is necessary to

13. Zechariah Chafee, Jr., *Free Speech in the United States,* (1942) p. 35.

14. (1944) 322 U.S. 680.

notice here. Section 3 created three new offences namely: (1) whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies (2) and whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, (3) or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment, for not more than twenty years, or both. Section 4 of this Title, made the conspiring of two or more persons to violate the provisions of section 3 also punishable.

Attorney-General Gregory suggested that the Espionage Act, 1917 may be amended by making attempts to obstruct the recruiting service and efforts intentionally to discredit and interfere with the raising of war loans criminal. The Senate Judiciary Committee expanded the scope of this amendment by making a variety of utterances of a disloyal character criminal. The amendment as finally passed is referred to as the Sedition Act, 1918. This was repealed on 3 March 1921. At the present time, the Espionage Act alone is in force. The Sedition Act aforesaid not only amended clause 3 of section 3 of the Espionage Act by making attempts to wilfully obstruct the recruiting or enlistment service in the United States punishable, but also created a number of other offences by expanding section 3 of the Espionage Act. For instance, the wilful uttering, printing, writing or publishing of any disloyal, profane, scurrilous or abusive language about the form of government of the United States, or the flag of the government or the uniform of the Army or Navy, the advocating by printing, writing or speech the curtailment of production, the saying or doing of anything, except by way of any bona fide and not disloyal advice, with the intent of obstructing the sale of United States bonds were all made offences punishable with fines up to $10,000 and imprisonments up to 20 years.

Schenck v *United States.* In *Schenck* v *United States*[15] it was ruled that the constitutional guarantee of freedom of speech and press was not infringed by the provisions of sections 3 and 4 of the Espionage Act, 1917 under which a conviction was allowable for a conspiracy which tended to influence persons subject to the Selective Draft Act, 1917, to obstruct such draft. The case involved a conspiracy to distribute a circular attacking conscription in impassioned language as despotism in its worst form and a monstrous wrong against humanity and that it was the solemn duty of the citizens to assert their opposition to the draft. These circulars were sent through the mails to drafted men. Mr. Justice Homes delivering the unanimous opinion of the Supreme Court upheld the conviction of two persons Charles T. Schenck and Elizabeth Baer on the ground that although in many places and in ordinary times those persons would, in saying all that was said in the circular, have been within their constitutional rights, they were still punishable, because at a time of war they could not be permitted to say things whose natural tendency was to obstruct the recruitment of persons into military service. He said (p. 52):

We admit that in many places and in ordinary times the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. *Aikens* v. *Wisconsin,* 195 U.S. 194. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *Gompers* v. *Buck's Stove* and *Range Co.*, 221 U.S. 418. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruting service were proved,

15. (1919) 249 U.S. 47.

liability for words that produced that effect might be enforced. The statute of 1917, in Section 4, punishes conspiracies to obstruct as well as actual obstruction. If the act (speaking, or circulating a paper), its tendency and the intent with which it is done, are the same, we perceive no ground for saying that success alone warrants making the act a crime.[16]

The United States Sedition Act, 1798. A significant curtailment of freedom of expression by a congressional enactment during peace time occurred in 1798 when the Sedition Act of that year was passed. It is an enactment most sweeping in character, and, in the view of many competent persons, it constituted a flagrant violation of the First Amendment. It provided :

That if any person shall write, print, utter or publish......any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress......or the President......with intent to defame the said government......or to bring them......into contempt or disrepute; or to excite against them ......the hatred of the good people of the United States......shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.

The provision, aforesaid, which identified the government with the individuals who administered it, was carried only by a very narrow majority of three votes in one house and four in another. The constitutionality of this measure did not come up for adjudication at the hands of the Supreme Court. It was upheld as valid by the lower courts and there were several convictions under it also. One of the most famous of these sedition trials was the one in which Matthew Lyon, member of Congress from Vermont, was indicted and convicted for publishing in the Vermont Gazette a letter criticizing the President and also for abetting in the publication of a letter from a member of Congress suggesting that the President be sent 'to a mad house.' He was sentenced to undergo imprisonment for a period of 4 months and pay a

16. See also the cases of *Frohwerk* v. *United States* (1919) 249 U.S. 204; *Debs* v. *United States* (1919) 249 U.S. 211; *Abrams* v. *United States* (1919) 249 U.S. 616.

fine of $1,000. His constituents not only collected sufficient money for payment of the fine but also re-elected him. A number of newspaper editors and publishers were also convicted under this Act. In 1800 the Federalist party which had sponsored this enactment was defeated at the polls. Jefferson, immediately after his inauguration as President, pardoned all those convicted under the Act. He went a step further and declared that the statute was null and void from the beginning. In a letter which he wrote in July 1804 he said: 'I discharged every person under punishment or prosecution under the sedition law, because I considered and now consider that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.'[17]

The Sedition Act of 1798, which by section 4 provided, that the Act was to continue in force no longer than 3 March 1801, became automatically defunct on that date.

Professor Edward P. Cheyney has commented on the enactment of the Sedition Act, 1798, in these terms:

> The passage of the Sedition law of 1798 and of its companion statute the Alien law has always since been considered an indefensible action on the part of the President and the majority in Congress. They were not so much laws for the protection of the State, which was in no danger, as they were for the exemption of holders of office at the time from criticism and political and personal abuse. They have never been reënacted, at least in time of peace. Nevertheless, they represent a thread in our National and State history that has, however slender, been continuous, a legislative, executive, or judicial deviation from the recognition of complete freedom of speech, under the claim or with the excuse of the need of protection of the administrators of the Government.[18]

A brief account of the control of the press in England up to 1695. After the invention of printing, the English monarchs for a long time would not allow any one to print

17. *Writings of Thomas Jefferson, Memorial Edition,* XI, pp. 43-44.
18. See Edward P. Cheyney writing in the *Annals of The American Academy of Political and Social Science,* vol. 200, bearing the title *Freedom of Inquiry and Expression,* (1938) p. 6.

anything except by special Royal licence. All the printing presses were placed under the control of the king-in-Council, and regulated by proclamations and decrees of the Star Chamber. In the year 1557 the Stationers' Company was formed, and the exclusive privilege of printing was given to ninety-nine London stationers, and their successors, members of the Company aforesaid. Publications issued by persons who were not members of the stationers' guild were liable to be seized. In 1586 the Star Chamber allowed the Oxford and Cambridge Universities to have printing presses. Queen Elizabeth, not content with governmental control over printing, introduced in 1559 a kind of censorship, by which it was made obligatory for all books before they were printed to be read and approved by certain bishops and privy councillors. In 1586 the Star Chamber introduced a system of licensing, by which all non-legal books had to be read in manuscript and passed by the Archbishop of Canterbury or the Bishop of London and legal books by the Chief Justice of either Bench or the Lord Chief Baron. As the restriction placed on the number of printing presses broke down the Government made stringent rules requiring, that no books should be published without a previous licence. In 1637, the Star Chamber passed a decree by which all printed books had to be submitted to the licensers and registered by the Stationers' Company before they could be published; and if there was a breach of these conditions, the printer was liable to be fined and debarred permanently from practising his craft, and all copies of the unlicensed publication were liable to be forfeited to the Crown. After the Star Chamber was abolished, the Long Parliament issued two decrees one on 9 May 1642 and another on 14 June 1643 continuing substantially the restrictions upon printing which the Star Chamber had established by its decree of 1637. In fact, the famous pamphlet which John Milton wrote in 1644, under the title *Areopagitica,* pleading for the liberty of unlicensed printing, was a protest addressed to the Lords and Commons against the decrees passed by the Long Parliament continuing press censorship. The Licensing Act of 1662 placed the system of licensing on a statutory basis, the licensing authorities being Judges, Secretaries of State,

Bishops and University Heads. This Act was renewed from time to time. By refusing to renew the Act once more in 1695, the House of Commons took a step, the effect of which upon the liberty of the press it was scarcely aware of at the time. The system of censorship had come to an end as though by an accident.

Non-renewal of the Licensing Act in 1695. All the available contemporary evidence points to the fact that the House of Commons in condemning the licensing Act was impelled wholly by practical considerations. The step was not prompted by any feeling or consciousness of the importance of allowing unlicensed printing in order to promote the free circulation of ideas in a healthy society. As Macaulay has observed :

> Clarke delivered to the Lords in the painted Chamber a paper containing the reasons which had determined the Lower House not to renew the Licensing Act. This paper completely vindicated the resolution to which the Commons had come. But it proves at the same time that they knew not what they were doing, what a revolution they were making, what a power they were calling into existence. They pointed out concisely, clearly, forcibly, and sometimes with a grave irony which is not unbecoming, the absurdities and iniquities of the statute which was about to expire. But all their objections will be found to relate to matters of detail. On the great question of principle, on the question whether the liberty of unlicensed printing be, on the whole, a blessing or a curse to society, not a word is said. The Licensing Act is condemned, not as a thing essentially evil, but on account of the petty grievances, the exactions, the jobs, the commercial restrictions, the domiciliary visits, which were incidental to it. It is pronounced mischievous because it enables the Company of Stationers to extort money from publishers, because it empowers the agents of the government, to search houses under the authority of general warrants, because it confines the foreign book trade to the port of London, because it detains valuable packages of books at the Custom House till the pages are mildewed. The Commons complain that the amount of the fee which the licenser may demand is not fixed. They complain that it is made penal in an officer of the Customs to open a box of books from abroad, except in the presence of one of the censors of the press. How, it is very sensibly asked, is the officer to know that there are books in the box till he has opened it? Such were the arguments which did what Milton's *Areopagitica* had failed to do.[19]

19. Macaulay, *History of England* (1872), vol. IV, p. 78.

Abolition of stamp duties on newspapers and Fox's Libel Act. The stamp duties levied on newspapers and advertisements, which were first introduced in 1712 during the reign of Queen Anne, were abolished in 1855. The Fox's Libel Act, 1792, by providing that in every case of criminal libel, the trial shall be by a jury, who were competent to give a general verdict of guilty or not guilty upon the whole matter put in issue, and not merely on the proof of publication and the sense ascribed to the words in the indictment, placed the press in an advantageous position.

Present position of freedom of press in England. Today it is open to anybody in England to say or publish what he pleases subject to the consequences of law. There is no prior licence required for or censorship upon publication in England. The only vestige remaining of censorship is the control exercised by the Lord Chamberlain under the Theatres Regulation Act, 1843, over plays, the said authority being empowered for the preservation of good manners, decorum or of the public peace, to forbid the acting or presenting of any play or any portion thereof everywhere or only in specified theatres.

Professor Dicey has put the legal position of the press in England in these words :

> The present position of the English Press is marked by two features. First, 'The liberty of the press' says Lord Mansfield, 'consists in printing without any previous licence, subject to the consequences of law.' *Rex* v. *Dean of St. Asaph,* 3 T.R. 431 (note). 'The law of England,' says Lord Ellenborough, 'is a law of liberty, and consistently with this liberty we have not what is called an *imprimatur;* there is no such preliminary licence necessary; but if a man publishes a paper, he is exposed to the penal consequences, as he is in every other act, if it be illegal'......Hence, with one exception i.e. the licensing of plays (See the Theatres Act, 1843, 6 and 7 Vict. c. 68), which is a quaint survival from a different system, no such thing is known with us as a licence to print, or a censorship either of the press or political newspapers......Secondly, Press offences, in so far as the term can be used with reference to English law, are tried and punished only by the ordinary Courts of the country, that is, by a judge and jury.[20]

20. A. V. Dicey, *Law of the Constitution* (Eighth Edition), pp. 243-246.

Position of freedom of press in United States and England compared. It would be interesting to compare the position of the press in England under the English legal system with the position of the press in the United States under the Constitution of the United States. As in England, so in the United States, the press is not subject to any previous restraints in the form of licences and censorship. Breaches of the law by the press are triable in the United States by the ordinary courts of the land in the same way they are tried in England. The courts in the United States have held that the guarantee of freedom of press contained in the Constitution is inconsistent with any form of licensing or censorship. *Lovell* v *Griffin,* (1938) 303 U.S. 444 ; *Near* v *Minnesota* (1931) 283 U.S. 697.

Chief Justice Hughes in holding invalid in *Lovell* v *Griffin*[21] a municipal ordinance, which prohibited the distribution, without a licence, of circulars, handbooks, advertising or literature of any kind, as inconsistent with the freedom of the press guaranteed by the Constitution has observed as follows (pp. 451-452) :

> We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to licence and consorship. The struggle for the freedom of the press was primarily directed against the power of the licenser. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish 'without a licence what formerly could be published only *with* one.' See Wickwar, The Struggle for the Freedom of the press' p. 15. While this freedom from previous restraint upon publication cannot be regarded as exhausting the guarantee of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision......Legislation of the type of the ordinance in question would restore the system of licence and censorship in its baldest form.

There is one important point of difference to be noted with regard to the respective positions accorded to freedom

21. (1938) 303 U.S. 444.

of the press under the constitutional systems of England and the United States. There is no constitutional impediment to the abridgement of freedom of the press by a parliamentary enactment in England because the legislative authority of the English Parliament is supreme. Courts in England can only apply the law, as formulated by Parliament, and cannot get behind the law. But the position of the press in the United States is somewhat different. Even legislatures, both Federal and State, are under constitutional restraint; and in the matter of curtailment of the freedom of the press, they have no free hand like the English Parliament. The First and Fourteenth Amendments impose restraints upon the Congress and the State legislatures to prevent the abridgement of the freedom of speech and the press. There are limits beyond which these legislatures may not go. As Mr. Justice Roberts speaking for the Supreme Court in *Herndon* v *Lowry*[22] has observed (p. 258):

> The power of a State to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgement of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the State. Legislation which goes beyond this need violates the principle of the Constitution.

The case of *Near* v *Minnesota*,[23] which I have already considered in the first chapter, shows, that a statute enacted by a State, by which power is given to certain courts to suppress as a nuisance, after an inquiry, a newspaper on the ground that it habitually indulges in the publication of malicious, scandalous or defamatory matter, must be deemed to be unconstitutional as it is tantamount to censorship by laying previous restraints upon publication. Chief Justice Hughes in delivering the opinion of the Supreme Court in that case observed (pp. 713-714):

22. (1937) 301 U.S. 242.
23. (1931) 283 U.S. 697.

The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guarantee to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: 'The liberty of the press is indeed essential to the nature of a free State; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.' 4 Bl. Com. 151, 152.

Chief Justice Hughes pointed out in the *Minnesota* case that the American concept of the liberty of the press guaranteed under the American Constitution is wider and more flexible than the Blackstonian version of the liberty of the press which lays emphasis on mere exemption from previous restraints. As Chief Justice Hughes has observed (pp. 714-715) :

The criticism upon Blackstone's statement has not been because immunity from previous restraint upon publication has not been regarded as deserving of special emphasis, but chiefly because that immunity cannot be deemed to exhaust the conception of the liberty guaranteed by State and Federal Constitutions. The point of criticism has been 'that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions,' and that 'the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications.' 2 Cooley, Const. Lim. (8th Ed.) p. 885. But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeller to responsibility for the public offence, as well as for the private injury, are not abolished by the protection extended in our Constitutions. Id., pp. 883, 884. The law of criminal libel rests upon that secure foundation. There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions. *Patterson* v. *Colorado*, 205 U.S. 454; *Toledo Newspaper Company* v. *United States*, 247 U.S. 402, 419.

Previous restraints upon publication permissible only under exceptional circumstances. It should not be supposed that the exemption from previous restraints upon publication is an absolute one. As we have already noticed, any legislative enactment which requires the taking out of a licence to print and publish a newspaper, or which imposes a censorship on the publication of a book or pamphlet, would be regarded as infringing the liberty of the press guaranteed by the Constitution, *Lovell* v *Griffin*.[24] But nobody can say, for instance, that governmental restraint on the publication of the sailing dates of transports or the number or location of troops is constitutionally forbidden, as imposing previous restraint upon the publication of news. Chief Justice Hughes in *Near* v *Minnesota*[25] has pointed out that the rule regarding immunity from previous restraints is not an inflexible one, but is subject to exceptions. He has observed in that case (pp. 715-716) :

> The objection has also been made that the principle as to immunity from previous restraint [enunciated by Blackstone] is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases. 'When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right.' *Schenck* v. *United States,* 249 U.S. 47, 52. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guarantee of free speech does not 'protect a man from an injunction against uttering words that may have all the effect of force. *Gompers* v. *Buck's Stove* and *Range Co.,* 221 U.S. 418, 439.' *Schenck* v. *United States, supra.* These limitations are not applicable here. Nor are we now concerned with questions as to the extent of authority to prevent publications in order to protect private rights

24. (1938) 303 U.S. 444.
25. (1931) 283 U.S. 697.

according to the principles governing the exercise of the jurisdiction of courts of equity.

Constitutionality of a tax on gross receipts from newspaper advertisements. In 1936 the Supreme Court was called upon to decide the constitutionality of a Louisiana State tax on the gross receipts of newspaper advertisements. The long and bitter struggle, which was carried on in England for the abolition of the newspaper stamp tax and the tax on advertisements, on the ground that they were taxes on knowledge, reacting upon the circulation of papers and curtailing the opportunities of the people to acquire knowledge in respect of their governmental affairs, forms an interesting chapter in the history of the freedom of the press in England. In the case of *Grosjean* v *American Press Co.*,[26] the judicial problem of the validity of such taxes under the Fourteenth Amendment was presented for consideration. A tax of two per cent was sought to be levied under the Louisiana Act 23 of 1934, upon the gross receipts from advertisements of any newspaper, magazine, periodical or publication having a circulation of more than 20,000 copies per week, the tax being in addition to all other taxes levied upon them, and regarded as a licence tax for the privilege of engaging in such business, that is to say, the business of selling or making any charge for advertisements.

The tax was assailed upon two grounds: (1) that it constituted an abridgement of freedom of the press, in contravention of the due process clause of the Fourteenth Amendment and (2) that it denied equal protection, in contravention of the equal protection of the laws clause of the same amendment. The Court, if it had wanted, might have held the statute unconstitutional, on the second of these two grounds, as there was a plain discrimination against a particular category of newspapers. There was clear evidence to warrant such a finding, as the records disclosed that, while there were thirteen newspapers with a circulation of over 20,000 per week, there were four daily newspapers each having a circu-

26. (1936) 297 U.S. 233.

lation of slightly less than 20,000 copies per week, and 120 other weekly papers with smaller circulations, the papers in the last two categories competing to a smaller or greater degree with the newspapers in the first category for advertising matter. The Court did not consider it necessary to deal with the second ground as it vetoed the taxing measure on the first ground, the more important of the two, that it was an abridgement of the constitutional guarantee of freedom of the press.

The opinion of the Court was written by Mr. Justice Sutherland. He pointed out that the advertisement tax and the stamp tax levied on newspapers were the targets of bitter attacks in England, as obnoxious taxes tending toward the suppression or abridgement of the liberty of a free press, and were ultimately abolished. The advertisement tax, assailed in the present case, shared the same infirmity, and could not therefore be regarded as consistent with the constitutional guarantee of freedom of the press. The learned judge was, however, careful to point out that by holding that the advertisement tax in question unconstitutional he was far from suggesting that newspaper owners were immune from liability to ordinary taxation. He said (p. 250): 'It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government.But this is not an ordinary form of tax, but one single in kind with a long history of hostile misuse against the freedom of the press.'

The laying of a direct tax on dissemination of knowledge unconstitutional. It is now established that an attempt to lay a direct tax upon the act of distributing information of any kind, whether of a political, scientific, or religious character, when done solely in an effort to spread knowledge and ideas, and without any thought of commercial gain, would be a contravention of the First Amendment as abridging the constitutional guarantees of the freedoms of press and religion.[27]

27. *Murdock* v. *Pennsylvania* (1943) 319 U.S. 105; *Jones* v *Opelika* (1943) 319 U.S. 103.

Accordingly the levy of a flat licence tax by a municipality on religious colporteurs, as a condition to the pursuit of their acitvities, namely, the distribution of religious literature as part of their campaign to spread religious doctrines, has been held invalid as imposing a direct charge upon the exercise of a right guaranteed by the Constitution.[28]

In 1942, the Supreme Court, by a majority of five against four, had held in the case of *Jones* v *Opelika*,[29] that a city ordinance requiring that licences be procured, after paying the prescribed licence fee, for the business of selling books and pamphlets on the streets or from house to house within the municipal limits, was constitutional even as applied to itinerant missionaries belonging to a religious organization known as the Jehovah's witnesses, who went about soliciting people to purchase certain religious books and pamphlets, all published by the Watch Tower Bible & Tract Society, the price of the books being twenty-five cents each, and the price of the pamphlets five cents each. Mr. Justice Reed, in delivering the majority opinion of the Court, had held that the licence fee, which was a non-discriminatory tax levied from all those seeking to sell books and papers, was not within the constitutional prohibition against the abridgement of the freedoms of worship, speech and press. There were three separate dissenting opinions. In a vigorous dissenting opinion, Mr. Chief Justice Stone had observed, that upon 'its face a flat licence tax restrains in advance the freedom taxed and tends inevitably to suppress its exercise,' and that, if taxes of the kind in question laid in small communities upon peripatetic religious propagandists were to be sustained, then, he was certain that 'a way had been found for the effective suppression of speech and press and religion despite constitutional guarantees.'

A motion for rehearing of the case was granted, and the earlier decision was vacated by Mr. Justice Douglas speaking for the Court in *Jones* v *Opelika*.[30] The reasons for the

28. *Murdock* v. *Pennsylvania* (1943) 319 U.S. 105.
29. (1942) 316 U.S. 584.
30. (1943) 319 U.S. 103.

reversal were given in the companion case of *Murdock* v *Pennsylvania*.[31] In the *Murdock* case Mr. Justice Douglas in delivering the opinion of the Court observed (pp. 110-113):

The alleged justification for the exaction of this licence tax is the fact that the religious literature is distributed with a solicitation of funds. Thus it was stated, in *Jones* v. *Opelika, supra*, p. 597, that when a religious sect uses 'ordinary commercial methods of sales of articles to raise propaganda funds', it is proper for the State to charge 'reasonable fees for the privilege of canvassing.' Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction at times is vital. As we stated only the other day, in *Jamison* v. *Texas*, 318 U.S. 413, 417, 'The States can prohibit the use of the streets for the distribution of purely commercial leaflets, even though such leaflets may have 'a civic appeal, or a moral platitude' appended. *Valentine* v. *Chrestensen*, 316 U.S. 52, 55. They may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes.' But the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project......It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. It is plain that a religious organization needs funds to remain a going concern. But an itinerant evangelist, however misguided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defray his expenses or to sustain him. Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way. As we have said, the problem of drawing the line between a purely commercial activity and a religious one will at times be difficult. On this record it plainly cannot be said that petitioners were engaged in a commercial rather than a religious venture......we do not mean to say that religious groups and the press are free from all financial burdens of government ......We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connexion with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon......It is a licence tax—a flat tax imposed on the exercise

31. (1943) 319 U.S. 105.

of a privilege granted by the Bill of Rights. A State may not impose a charge for the enjoyment of a right granted by the Federal Constitution.

Limits of municipal or State control of freedom of speech consistently with the constitutional guarantee. The Supreme Court in *Schneider v Irvington*[32] has held, that although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, it may not prevent an individual, who is rightfully upon a street, to distribute handbills, pamphlets or other literature to persons who are willing to receive them, merely on the ground that such distribution would cause litter to accumulate on the streets and add to the burden of the city authorities to keep the streets clean. Any city ordinance proscribing distribution of literature in the streets would, the court said, constitute an abridgement of the constitutional liberty of disseminating ideas and information, in contravention of the constitutional guarantee of freedom of speech and press. But the person distributing such matter is certainly amenable to the control of traffic regulations as he cannot be allowed to exercise this right by ' taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic.'

In *Valentine* v *Chrestensen*[33] the Supreme Court has held that the distribution of commercial advertising matter stood on a different footing and there was no constitutional objection to a municipal ordinance forbidding distribution of such matter in the streets.

In *Cantwell* v *Connecticut*[34] Mr. Justice Roberts delivering the unanimous opinion of the Supreme Court held that a statute which prohibited a person who solicited money or a valuable thing for any alleged religious, charitable or philanthropic cause, from a person other than a member of the soliciting organization, unless he had obtained a certificate from

32. (1942) 308 U.S. 147.
33. (1942) 316 U.S. 52.
34. (1940) 310 U.S. 296.

the secretary of the public welfare council testifying to the bona fide character of the cause for which the solicitation was made, violated the guarantee of freedom of speech and religion, as applied to the members of a religious organization known as the Jehovah's witnesses, who went about from house to house soliciting contributions for the publication of religious books of their denomination and also urging persons to buy pamphlets and books explaining the doctrines of their creed for small sums of money. The judge held that an Act which required a previous certificate from a public authority to disseminate religious views amounted to a censorship on religion and a denial of the constitutional liberty of free propagation of religious doctrines.

The decisions have no doubt emphasized the principle that the liberty to propagate religious views is not unlimited and that reasonable regulations may be made to control the time and manner of such propagation in the interests of public safety, peace, comfort or convenience.[35] It cannot be suggested, for instance, that a person under the cloak of religion may commit frauds upon the public with impunity. Nor can there be any doubt that a State is competent, in order to protect its citizens from fraudulent solicitation, to require a stranger to establish his identity and his authority to act for the cause which he purports to represent.

The question has arisen in the United States, as to how far city regulations, intended to protect its citizens from needless annoyance by itinerant preachers who invade homes at all hours of the day seeking to propagate religious views, may go without violating the constitutional guarantee of freedom of speech and religion. Such a question was presented for decision in the case of *Martin* v *Struthers*.[36] The City of Struthers in Ohio had passed an ordinance in these terms: 'It is unlawful for any person distributing handbills, circulars or other advertisements to ring the door bell, sound the door

35. See per Roberts J., in *Cantwell* v. *Connecticut* (1940) 310 U.S. 296, pp. 306-7.

36. (1943) 319 U.S. 141.

knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars or other advertisements, they or any person with them may be distributing.' The appellant, a member of a religious group known as Jehovah's witnesses, was convicted and sentenced to pay a fine of $10·00 on a charge of violating the ordinance aforesaid, by going to the homes of strangers and knocking on doors and ringing door bells in order to distribute to the inmates of the homes, leaflets advertising a religious meeting. It was in evidence that the City was largely peopled by industrial workers engaged in the iron and steel industry, who worked frequently on swing shifts, working during nights and sleeping during day-time, so that the ringing of bells by persons even by day would seriously interfere with the sleep of such workers.

Mr. Justice Black in delivering the opinion of the Court held that the conviction was bad and that the ordinance as applied to a person distributing leaflets for a religious meeting was invalid as denying the constitutional freedom of speech and press. The judge pointed out that there was no objection to an ordinance which made it an offence for any person to ring the bell of a householder who had indicated in an appropriate manner that he was unwilling to be disturbed. The judge observed (pp. 145-149):

> While door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best traditions of free discussion. The wide-spread use of this method of communication by many groups espousing various causes attests its major importance......Many of our most widely established religious organizations have used this method of disseminating their doctrines and labouring groups have used it in recruiting their members......Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas......The National Institute of

Municipal Law Officers has proposed a form of regulation to its member cities which would make it an offence for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed. This or any similar regulation leaves the decision as to whether distributors of literature may lawfully call at a home where it belongs—with the home-owner himself. A City can punish those who call at a home in defiance of the previously expressed will of the occupant and, in addition, can by identification devices control the abuse of the privilege by criminals posing as canvassers. In any case, the problem must be worked out by each community for itself with due respect for the constitutional rights of those desiring to distribute literature and those desiring to receive it, as well as those who choose to exclude such distributors from the home.

Mr. Justice Reed wrote a dissenting opinion in which Mr. Justice Roberts and Mr. Justice Jackson concurred. In the course of his dissent Mr. Justice Reed observed (p. 156) :

If the citizens of Struthers desire to be protected from the annoyance of being called to their doors to receive printed matter, there is to my mind no constitutional provision which forbids their municipal council from modifying the rule that anyone may sound a call for the householder to attend his door. It is the council which is entrusted by the citizens with the power to declare and abate the myriad nuisances which develop in a community. Its determination should not be set aside by this Court unless clearly and patently unconstitutional.

Rights of labour to publicize the facts of a labour dispute by means of pamphlets, word of mouth or peaceful picketing. It has been held in *Thornhill* v *Alabama*[37] that the constitutional guarantee of free speech includes the right of labour to publicize the facts of a labour dispute, whether by printed sign, by pamphlet, by word of mouth, or peaceful picketing without annoyance or threat of any kind. Peaceful picketing was held to be the workingman's means of communication to the public of his grievances. In setting aside the conviction of a person called Byron Thornhill, for having picketed the premises of his employers the Brown Wood Preserving Company along with five or six of his fellow workmen to induce persons

37. (1940) 310 U.S. 88.

in a peaceful way not to enter the employer's premises for work as a strike was on, in contravention of the provisions of an Alabama statute which proscribed a wide range of activities like picketing, Mr. Justice Murphy said (pp. 104-105):

> The range of activities proscribed by Section 3448, whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labour dispute. The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern. It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgement of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in Section 3448.

In *Milk Wagon Drivers Union* v *Meadowmoor Dairies*[38] Mr. Justice Frankfurter in speaking for the Supreme Court held that, where picketing though in itself peaceful was carried on in a context of violence, the courts were not precluded from granting an injunction forbidding the picketing, upon the ground that, picketing 'in connexion with or following a series of assaults or destruction of property, could not help but have the effect of intimidating the persons in front of whose premises such picketing occurred' and cause them to believe that non-compliance would possibly be followed by acts of an unlawful character. Mr. Justice Frankfurter observed (pp. 297-298):

38. (1941) 312 U.S. 287.

We do not qualify the *Thornhill* and *Carlson* decisions. We reaffirm them. They involved statutes baldly forbidding all picketing near an employer's place of business. Entanglement with violence was expressly out of those cases. The statutes had to be dealt with on their face, and therefore we struck them down. Such an unlimited ban on free communication declared as the law of a State by a State court enjoys no greater protection here. *Cantwell* v. *Connecticut,* 310 U.S. 296; *American Federation of Labour* v. *Swing, post,* p. 321. But just as a State through its legislature may deal with specific circumstances menacing the peace by an appropriately drawn act, *Thornhill* v. *Alabama, supra,* so the law of a State may be fitted to a concrete situation through the authority given by the State to its courts. This is precisely the kind of situation which the *Thornhill* opinion excluded from its scope. "We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger......as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger.' 310 *U.S.* 105. We would not strike down a statute which authorized the courts of Illinois to prohibit picketing when they should find that violence had given to the picketing a coercive effect whereby it would operate destructively as force and intimidation. Such a situation is presented by this record. It distorts the meaning of things to generalize the terms of an injunction derived from and directed towards violent misconduct as though it were an abstract prohibition of all picketing wholly unrelated to the violence involved.

The limits of the power of courts to punish as contempts out-of-court comments on pending litigation. The recent case of *Bridges* v *California*[39] discusses the limits of the power of the courts to punish out-of-court comments pertaining to pending litigation consistently with the constitutional guarantee

39. (1941) 314 U.S. 252; I have not yet been able to get the text of the opinion delivered by the Supreme Court on 3 June 1946, in the Miami *Herald* contempt of court case. A brief message (USIS) published in the *Hindu,* Madras of June 9, 1946 stated that Mr. Justice Reed delivering the majority opinion of the court set aside the conviction for contempt holding that 'free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve' and that there was no immediate necessity 'to close the door of permissible public comment.' This view is an affirmation of the doctrine of the court in the *Bridges* case. A brief reference to this case appears in the issue of the American weekly newsmagazine *Time* dated 10 June, 1946.

of freedom of speech and of the press. The case disclosed a sharp difference of opinion among the judges. Mr. Justice Black speaking for the majority said that, in order to render an out-of-court comment on pending litigation punishable as contempt of court, it must be clear that such comment created 'a clear and present danger' that it would interfere with the fair administration of justice. Mr. Justice Frankfurter, on the other hand, in a dissenting opinion, which was concurred in by Chief Justice Stone and Justices Roberts and Byrnes, held that, the standard adopted by the lower courts for assessing the character of out-of-court comments upon pending litigation, namely, whether or not the comment had 'a reasonable tendency to interfere with the orderly administration of justice in pending actions' did not transgress the constitutional guarantee of freedom of speech and of the press. In the view of the minority, utterances which undermined the conditions necessary for a fair and impartial adjudication enjoyed no constitutional immunity.

Two separate cases arising out of different circumstances and involving different parties were disposed by the Supreme Court by a common judgement, because both involved an identical question, namely, the scope of the national constitutional policy safeguarding free speech and a free press.

In the first of these cases, the publisher and managing editor of the Los Angeles *Times* had been adjudged guilty and fined for contempt of court for an editorial written in that paper concerning a pending litigation. The offending editorial which bore the caption 'Probation for Gorillas ?', after vigorously denouncing two members of a labour union who had been found guilty of assaulting non-union truck drivers, ended with the observation : 'Judge A. R. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill.' Judge Scott had on the day previous to the publication of the editorial posted the case to another day, a month later, for passing orders upon the application of Shannon and Holmes for probation and for pronouncing sentence. The conviction for contempt was made upon

the basis that the editorial had an inherent and reasonable tendency to interfere with the orderly administration of justice in a matter then pending consideration before a court of law. Mr. Justice Black delivering the opinion of the Supreme Court held, that the editorial, given 'the most intimidating construction it will bear, did no more than threaten future adverse criticism which was reasonably to be expected anyway in the event of a lenient disposition of a pending case,' that there was no 'clear and present danger', that the course of justice would be deflected by the comment made, and that to regard the comment as capable of such influence 'would be to impute to judges a lack of firmness, wisdom, or honour' which he and his colleagues could not accept as a major premise.

I shall not go into the facts of the second case which involved the publication in certain newspapers of the contents of a telegram which a prominent labour leader had sent to the Secretary of Labour in regard to a labour dispute in respect of which a motion for new trial was then pending. It seems to me, however, worthwhile for us to take note of the manner in which the majority and the minority approached the general problem of the publication of out-of-court comments on pending litigation.

Mr. Justice Black speaking for the majority pointed out that the conviction of the petitioners had been based upon the common law concept of contempt which was not very precise but was of a most general and undefined character. It was not a case of the State of California itself having 'appraised a particular kind of situation and found a specified danger sufficiently imminent to justify a restriction on a particular kind of utterance.' The learned judge did not accept the view that their hands in this matter were tied by the English common law concept of contempt that courts could punish out-of-court publications tending to obstruct the orderly and fair administration of justice in a pending case. Mr. Justice Black observed (pp. 264-265) :

......to assume that English Common Law in this field became ours is to deny the generally accepted historical belief that 'one of the

objects of the Revolution was to get rid of the English Common Law on liberty of speech and of the press.' Schofield, *Freedom of the Press in the United States,* 9 Publications Amer. Sociol. Soc., 67, 76. More specifically it is to forget the environment in which the First Amendment was ratified. In presenting the proposals which were later embodied in the Bill of Rights, James Madison, the leader in the preparation of the First Amendment, said: 'Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question in that body [Parliament], the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution.' 1 *Annals of Congress* 1789-1790, 434. And Madison elsewhere wrote that 'the state of the press ......under the common law, cannot......be the standard of its freedom in the United States.' VI *Writings of James Madison* 1790-1802, 387. There are no contrary implications in any part of the history of the period in which the First Amendment was framed and adopted. No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. It cannot be denied, for example, that the religious test oath or the restrictions upon assembly then prevalent in England would have been regarded as measures which the Constitution prohibited the American Congress from passing. And since the same unequivocal language is used with respect to freedom of the press, it signifies a similar enlargement of that concept as well. Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English practices. On the contrary, the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to other liberties, the broadest scope that could be countenanced in an orderly society.

Mr. Justice Black said that the constitutional guarantee of freedom of speech and of the press safeguarded even comments upon pending cases unless such comments created clear and imminent danger that they would interfere with the fair administration of justice. Judged in the light of the 'clear and present danger test', the conviction, he said, could not be sustained as the comments in respect of which the petitioners were sought to be punished could not be deemed to have overshot the limits of freedom of press guaranteed by the

Constitution. Mr. Justice Black in the course of his opinion observed (pp. 269-271):

Yet, it would follow as a practical result of the decisions below that anyone, who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted. Indeed, perhaps more so, because under a legislative specification of the particular kinds of expressions prohibited and the circumstances under which the prohibitions are to operate, the speaker or publisher might at least have an authoritative guide to the permissible scope of comment, instead of being compelled to act at the peril that judges might find in the utterance a 'reasonable tendency' to obstruct justice in a pending case. This unfocussed threat is, to be sure, limited in time, terminating as it does upon final disposition of the case. But this does not change its censorial quality. An endless series of moratoria on public discussion, even if each were very short, could hardly be dismissed as an insignificant abridgement of freedom of expression. And to assume that each would be short is to overlook the fact that the 'pendency' of a case is frequently a matter of months or even years rather than days or weeks. For these reasons we are convinced that the judgements below result in a curtailment of expression that cannot be dismissed as insignificant. If they can be justified at all, it must be in terms of some serious substantive evil which they are designed to avert. The substantive evil here sought to be averted has been variously described below. It appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice. The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect. The other evil feared, disorderly and unfair administration of justice, is more plausibly associated with restricting publications which touch upon pending litigation. The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper. But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon

pending cases. We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment.

Mr. Justice Frankfurter in the course of his dissenting opinion supporting the conviction observed (pp. 291-297):

Comment however forthright is one thing. Intimidation with respect to specific matters still in judicial suspense, quite another. See Laski, *Procedure for constructive contempt in England,* 41 *Harvard Law Review* 1031, 1034; Goodhart, *Newspapers and Contempt in English Law,* 48 *Harvard Law Review* 885. A publication intended to teach the judge a lesson, or to vent spleen, or to discredit him, or to influence him in his future conduct, would not justify exercise of the contempt power. Compare Judge Learned Hand in *Ex parte Craig,* 282 F. 138, 160-61. It must refer to a matter under consideration and constitute in effect a threat to its impartial disposition. It must be calculated to create an atmospheric pressure incompatible with rational, impartial adjudication. But to interfere with justice it need not succeed. As with other offences, the State should be able to proscribe attempts that fail because of the danger that attempts may succeed. The purpose, it will do no harm to repeat, is not to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed. The purpose is to protect immediate litigants and the public from the mischievous danger of an unfree or coerced tribunal. The power should be invoked only where the adjudicatory process may be hampered or hindered in its calm, detached, and fearless discharge of its duty on the basis of what has been submitted to court. The belief that decisions are so reached is the source of the confidence on which law ultimately rests......The rule of law applied in these cases by the California court forbade publications having 'a reasonable tendency to interfere with the orderly administration of justice in pending actions.' To deny that this age-old formulation of the prohibition against interference with dispassionate adjudication is properly confined to the substantive evil is not only to turn one's back on history but also to indulge in an idle play on words, unworthy of constitutional adjudication. It was urged before us that the words 'reasonable tendency' had a fatal pervasiveness, and that their replacement by 'clear and present danger' was required to state a constitutionally permissible rule of law. The Constitution, as we have recently had occasion to remark, is not a formulary. *Wisconsin* v. *J. C. Penney Co.,* 311 U.S. 435, 444. Nor does it require displacement of an historic test by a phrase which first gained currency on 3 March 1919. *Schenck*

v. *United States,* 249 U.S. 47. Our duty is not ended with the recitation of phrases that are the short-hand of a complicated historic process. The phrase 'clear and present danger' is merely a justification for curbing utterance where that is warranted by the substantive evil to be prevented. The phrase itself is an expression of tendency and not of accomplishment, and the literary difference between it and 'reasonable tendency' is not of constitutional dimension......In the cases before us there was no blanket or dragnet prohibition of utterance affecting courts. Freedom to criticize their work, to assail generally the institution of courts, to report and comment on matters in litigation but not to subvert the process of deciding—all this freedom was respected. Only the State's interest in calm and orderly decisions, which represented also the constitutional right of the parties, led it to condemn coercive utterances directed towards a pending proceeding. California, speaking through its courts, acted because of their conclusion that such utterances undermined the conditions necessary for fair adjudication.

Constitutional guarantee of Freedom of Assembly—What it means. I shall pass on to the second part of this provision by which both the Federation and the States are precluded from passing any laws which will unreasonably abridge the right of the people peaceably to assemble for any reasonable purpose. I have used the adjective 'reasonable' instead of 'lawful' to qualify the word 'purpose' advisedly; because, I would not like to give to the legislatures the final authority to say what is and what is not a legitimate purpose. I would have the final say in this matter given to the courts; so that, even a legislative determination that an assembly which meets with a certain purpose is 'unlawful' would not conclude the matter.

The right of peaceable assembly is a right cognate to that of free speech and free press and is equally fundamental for the proper working of a free society. Consequently, this right should not be abridged unless the need for such abridgement is plainly warranted by the public weal.

The Bill of Rights Committee of the American Bar Association meeting under the chairmanship of Mr. Grenville Clark of New York asked for special leave to intervene in the important case of *Hague* v *Committee for Industrial Organization*[40] and filed an excellent brief supporting vigorously the maintenance unimpaired of the freedom of Assembly. In the course of that brief they said:

40. (1939) 307 U.S. 496.

Freedom of Assembly is an essential element of the American democratic system. At the root of this case lies the question of the *value* in American life of the citizen's right to meet face to face with others for the discussion of their ideas and problems—religious, political, economic or social. Public debate and discussion take many forms including the spoken and the printed word, the radio and the screen. But assemblies face to face perform a function of vital significance in the American system, and are no less important at the present time for the education of the public and the formation of opinion than they have been in our past history. The right of assembly lies at the foundation of our system of government. The corner-stone of that system is that government--all government, whether Federal, or State or local—shall be based on the consent of the governed. But 'the consent of the governed' implies not only that the consent shall be uncoerced but also that it shall be grounded on adequate information and discussion. Otherwise the consent would be illusory and a sham. No truth has been more strongly enforced by the history of recent years than that the suppression of discussion leads directly to tyranny and the loss of all other civil rights. On the other hand experience proves the necessity of a *constant process of open debate* if a free and democratic government is to function effectively. Satisfactory public opinion in a crisis is impossible unless both sides can present their contentions in meetings and through the press. Only in this way can public opinion take shape in legislation that will command the general support which will make it law in a real sense. Only so, also, can government on its administrative side be kept reasonably free from abuses. Only through free discussion, in short, can democracy function at all. These are old truths but they need constantly to be remembered and applied. There is a special aspect of free expression here present. The effort in this case was to suppress only *some* communications and *some* meetings. It is plain that the suppression was on the basis that the speakers and their probable utterances would be unpopular. And it is this very feature that gives a special importance to this case. What may be popular today may be unpopular tomorrow; and no principle could be more destructive of American free speech than to judge the permissibility of a public meeting by any standard of its popularity. The right to express unpopular opinions and to hold unpopular meetings is of the essence of American liberty. This is not only for reasons of principle but for practical reasons of government. If criticism, however severe and unpopular, of majority beliefs were suppressed; nothing is more certain than that the American system could not long survive. When all is said the preservation of free speech and assembly depends on ascribing a high *relative value* to these rights.[41]

41. This passage appears in Professor Zechariah Chafee's book, *Free Speech in the United States,* (1942), pp. 414-15.

The important case of *Hague* v *Committee for Industrial Organization*[42] involved the validity of a municipal ordinance of the City of New Jersey requiring the obtaining of a permit for a public assembly in or upon the public streets, highways, public parks, or public buildings of the city and authorizing the director of public safety, for the purpose of preventing riots, disturbances, or disorderly assemblage, to refuse to issue a permit when after an investigation of all the facts and circumstances pertinent to the application he believed it to be proper to do so. A number of citizens of New Jersey and some unincorporated labour organizations composed of such citizens brought a suit in the District Court of the United States for the District of New Jersey for an injunction enjoining the enforcement of the ordinance on the ground that it was unconstitutional and void as infringing the freedom of speech and assembly forming part of the liberty guaranteed by the Fourteenth Amendment to the Constitution. The bill of complaint had alleged, inter alia, that the petitioners had been repeatedly refused permits to hold public meetings in the city for discussing the rights of citizens under the National Labour Relations Act. The impugned ordinance was sought to be supported as a valid exercise of the police power. A majority of the judges held that the ordinance was void. Mr. Justice Roberts in a concurring opinion holding the ordinance void observed as follows (pp. 513-516):

Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages and opportunities to accrue to citizens therefrom. All of the respondents' proscribed activities had this single end and aim......Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated

42. (1939) 307 U.S. 496.

in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order ; but it must not, in the guise of regulation be abridged or denied. We think the court below was right in holding the ordinance quoted in Note 1 void upon its face. It does not make comfort or convenience in the use of streets or parks the standard of official action. It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent 'riots, disturbances or disorderly assemblage.' It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs for the prohibition of all speaking will undoubtedly 'prevent' such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connexion with the exercise of the right.

Mr. Justice Stone in a concurring opinion said that he did not wish to rest the case on the narrow ground that the ordinance, so far as it sought to abridge the right of the petitioners as citizens of the United States to disseminate information about the National Labour Relations Act, which was a Federal statute, constituted an infraction of the privileges and immunities clause of the Fourteenth Amendment and was consequently invalid. He pointed out that since the rights of free speech and peaceable assembly were fundamental rights of personal liberty, secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment, the ordinance was invalid as preventing petitioners 'from holding meetings and disseminating information whether for the organization of labour unions or for any other lawful purpose.'

The case of *De Jonge* v *Oregon*[43] which I have already considered in the first chapter is an excellent illustration of the valuable protection afforded to the citizen by the constitutional guarantee of freedom of assembly. In that case a person called Dirk De Jonge who had spoken at a meeting held under the auspices of the communist party, an organization advocating criminal syndicalism, to protest against illegal raids on workers' halls and houses and the shooting of striking longshoremen by the police of Portland City, had been

43. (1937) 299 U.S. 353.

convicted and sentenced to imprisonment for seven years. Under a statute of Oregon, the teaching of criminal syndicalism, that is to say, the doctrine that violence and sabotage should be employed for bringing about political or industrial changes, and the presiding at or assisting in the conduct of a meeting held by an organization advocating criminal syndicalism were made punishable as crimes. The sole offence for which De Jonge had been charged and convicted was that he had assisted in the conduct of a public meeting organized by the communist party by speaking threat, although the object of the meeting was perfectly lawful and his speech was also quite unexceptionable. Mr. Chief Justice Hughes in delivering the opinion of the Court set aside the conviction of De Jonge holding that the Oregon statute as applied to the particular charge as defined by the Oregon court was repugnant to the due process clause of the Fourteenth Amendment. He pointed out that consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime and persons who take part in such discussion cannot be branded as criminals and punished.[44]

The right of peaceable assembly, like all other civil liberties, is not an absolute one and may, in appropriate circumstances, be abridged.

In the case of *Cox* v *New Hampshire*[45] we have a discussion of the question as to how far a State statute might go in regulating, by a system of municipal licensing, the taking out of parades and processions upon municipal highways. The State of New Hampshire had a statutory provision running thus: 'No theatrical or dramatic representation shall be performed or exhibited, and no parade or procession upon any public street or way, and no open-air public meeting upon any ground abutting thereon, shall be permitted, unless a special licence therefor shall first be obtained from the

44. See also the recent case of *Thomas* v. *Collins* (1945) 323 U.S. 516, the observations of Rutledge J., for the Court, pp. 539-540 are instructive.

45. (1941) 312 U.S. 569.

selectmen of the town, or from a licensing committee for cities hereinafter provided for'. The appellants who were five members of a religious organization called 'Jehovah's witnesses' along with sixty-three others belonging to the same organization had been convicted by the Municipal Court of Manchester, New Hampshire, for marching in the streets of Manchester city in close formation carrying religious placards without obtaining a licence for such a demonstration in contravention of the provision hereinbefore referred to. The appellants contended that the statutory provision in question was invalid as contravening the Fourteenth Amendment as it deprived appellants of their rights of freedom of worship, freedom of speech and press, and freedom of assembly, by vesting in the licensing authority, unreasonable, unlimited and discriminatory powers. They argued that they were ministers ordained to preach the gospel and that the parade was held for the purpose of disseminating information in the public interest and was one of their ways of worship.

Mr. Chief Justice Hughes in upholding the conviction of the appellants observed (pp. 573-576) :

> The sole charge against appellants was that they were 'taking part in a parade or procession' on public streets without a permit as the statute required. They were not prosecuted for distributing leaflets, or for conveying information by placards or otherwise, or for issuing invitations to a public meeting, or for holding a public meeting, or for maintaining or expressing religious beliefs. Their right to do any of these things apart from engaging in a 'parade or procession' upon a public street is not here involved and the question of the validity of a statute addressed to any other sort of conduct than that complained of is not before us. There appears to be no ground for challenging the ruling of the State court that appellants were in fact engaged in a parade or procession upon the public streets......Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restric-

tion of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions. As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places......In the instant case, we are aided by the opinion of the Supreme Court of the State, which construed the statute and defined the limitations of the authority conferred for the granting of licences for parades and processions. The court observed that if the clause of the Act requiring a licence 'for all open-air public meetings upon land contiguous to a highway' was invalid, that invalidity did not nullify the Act in its application to the other situations described......The court thought......that the regulation with respect to parades and processions was applicable only 'to organized formations of persons using the highways'; and that 'the defendants, separately, or collectively in groups not constituting a parade or procession,' were 'under no contemplation of the Act.'...... The obvious advantage of requiring application for a permit was noted as giving the public authorities notice in advance so as to afford opportunity for proper policing. And the court further observed that, in fixing time and place, the licence served 'to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travellers, and to minimize the risk of disorder.' But the court held that the licensing board was not vested with arbitrary power or an unfettered discretion; that its discretion must be exercised with 'uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination'; that a 'systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways, is the statutory mandate'......If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets. We find it impossible to say that the limited authority conferred by the licensing provisions of the statute in question as thus construed by the State court contravened any constitutional right.

Mr. Chief Justice Hughes pointed out that the ordinance involved in the *Hague* case was essentially different from the

one discussed in the instant case as the former had become an instrument for arbitrary suppression of views on public questions. He observed (pp. 577-578) :

> In *Hague* v. *Committee for Industrial Organization, supra,* the ordinance dealt with the exercise of the right of assembly for the purpose of communicating views; it did not make comfort or convenience in the use of streets the standard of official action but enabled the local official absolutely to refuse a permit on his mere opinion that such refusal would prevent 'riots, disturbances or disorderly assemblage.' The ordinance thus created, as the record disclosed, an instrument of arbitrary suppression of opinions on pubiic questions.

III

Provision for ensuring religious liberty

Article II : Neither the Federation nor a State shall interfere with the free profession and practice of any religion by an individual so long his actions are not incompatible with public order or morality.

General. This Article is largely based upon that part of the First Amendment to the Constitution of the United States which safeguards the religious freedom of individuals. The provision as drafted above is intended to guarantee to every individual full freedom to profess and practise any religion. Freedom in religious matters involves two concepts, freedom to believe and freedom to act. The first is absolute but the second, in the very nature of things, cannot be. While the State ought not to intrude, and under the constitutional guarantee cannot intrude, into the domain of man's religious beliefs, his actions done under the colour of religion, while entitled to a wide measure of liberty, cannot be, and under the constitutional guarantee are not, completely immunized from State control and regulation.

Mr. Justice Douglas in his opinion for the Supreme Court in the recent case of *United States* v *Ballard*[46] in emphasizing the point that the First Amendment to the Constitution of the

46. (1944) 322 U.S. 78.

United States precluded any inquiry into the verity of a man's religious beliefs said (pp. 86-87) :

But on whichever basis the court rested its action, we do not agree that the truth or verity of respondents' religious doctrines or beliefs should have been submitted to the jury. Whatever this particular indictment might require, the First Amendment precludes such a course, as the United States seems to concede. 'The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.' *Watson* v. *Jones,* 13 Wall. 679, 728. The First Amendment has a dual aspect. It not only 'forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship' but also 'safeguards the free exercise of the chosen form of religion. *Cantwell* v. *Connecticut,* 310 U.S. 296, 303. 'Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.' Id., pp. 303-304. Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *Board of Education* v. *Barnette,* 319 U.S. 624. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relations to his God was made no concern of the State. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any group or any one

type of religion for preferred treatment. It puts them all in that position.

Freedom to believe in matters of religion is absolute while freedom to act under colour of religion is subject to reasonable control. While individuals are free to believe or disbelieve what they like in matters of religion, no well-ordered society can permit individuals unrestricted liberty to do what they please under the colour of religion. As Justices Black and Douglas in their joint concurring opinion in *Board of Education* v *Barnette*[47] have put it (pp. 643-644) :

> No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity.

Acts done in the name of religion might collide with the the rights of others. Such acts might also come into conflict with the peace, good order, or morals of society—interests, the preservation of which is of vital importance. It could never be supposed that the constitutional guarantee of religious liberty gives a charter to every individual to do anything which his theological beliefs may sanction, notwithstanding the injury such acts may cause to other interests whose protection is of prime importance to the well-being of society. How far a legislature may go in regulating conduct which clashes with such interests sets difficult problems for the courts. But that is part of the responsibility which the courts have to bear in performing their task of accommodating competing interests in a rational framework of rights and duties. As Mr. Justice Reed in his opinion for the Supreme Court in *Jones* v *Opelika*[48] has observed (pp. 593-595) :

47. (1943) 319 U.S. 624.
48. (1942) 316 U.S. 584.

Courts, no more than Constitutions, can intrude into the consciences of men or compel them to believe contrary to their faith or think contrary to their convictions; but courts are competent to adjudge the acts men do under colour of a constitutional right, such as that of freedom of speech or of the press or the free exercise of religion, and to determine whether the claimed right is limited by other recognized powers, equally precious to mankind. *Cantwell* v. *Connecticut*, 310 U.S. 296, 303; *Reynolds* v. *United States* 98 *U.S.* 145, 166. So the mind and spirit of man remain forever free, while his actions rest subject to necessary accommodation to the competing needs of his fellows. If all expression of religion or opinion, however, were subject to the discretion of authority, our unfettered dynamic thoughts or moral impulses might be made only colourless and sterile ideas. To give them life and force, the Constitution protects their use......Believing, as this Nation has from the first, that the freedoms of worship and expression are closely akin to the illimitable privileges of thought itself, any legislation affecting those freedoms is scrutinized to see that the interferences allowed are only those appropriate to the maintenance of a civilized society. The determination of what limitations may be permitted under such an abstract test rests with the legislative bodies, the courts, the executive, and the people themselves, guided by the experience of the past, the needs of revenue for law enforcement, the requirements and capacities of police protection, the dangers of disorder, and other pertinent factors. Upon the courts falls the duty of determining the validity of such enactments as may be challenged as unconstitutional by litigants.

Scope of freedom to propagate views on religion. But the power of the State to regulate the exercise of the chosen form of religion by an individual or a group must, to be valid, be reasonable. The State police power cannot be used in a way unduly to hamper the exercise of the protected constitutional freedom of religion. For instance, a State cannot, by statute, wholly deny the right to preach or to disseminate religious views, though it might regulate by general and non-discriminatory legislation the time and manner of conducting religious propaganda upon its streets, and the holding of meetings thereon. *Cantwell* v *Connecticut*.[49] A State also cannot levy a tax directly on the exercise of the right to disseminate views upon religious matters. In *Murdock* v

49. (1939) 310 U. S. 296.

Pennsylvania[50] the Supreme Court ruled, that a municipal ordinance which, as construed and applied, required religious colporteurs to pay a flat licence tax as a condition to the pursuit of their activities, was invalid as a denial of the freedoms of speech, press and religion.

Constitutional guarantee of religious freedom and conscription. As a government has the right to survive, it has the power to compel its citizens to render military service. In the *Selective Draft Law Cases*,[51] Chief Justice White in delivering the opinion of the Supreme Court said that it cannot be doubted 'that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it.' And the obligation to render military service is one which the citizen cannot avoid by invoking the constitutional guarantee for the free exercise of one's own religion. It is true that the Federal Legislature may, if it likes, grant exemptions to conscientious objectors to render military service. But if that legislature were to compel the citizens to render military service, despite their religious views, there is no constitutional means of escape from that duty.

In *United States* v *Macintosh*[52] Mr. Justice Sutherland delivering the opinion of the Court characterized the contention put forward in petitioner's brief that it was 'a fixed principle of our Constitution zealously guarded by our laws, that a citizen cannot be forced and need not bear arms in a war if he has conscientious religious scruples against doing so' as an astonishing statement, without any support in the Constitution, and observed (pp. 623-624) :

> This, if it means what it seems to say, is an astonishing statement. Of course, there is no such principle of the Constitution fixed or otherwise. The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision express or implied;

50. (1943) 319 U.S. 105.
51. (1918) 245 U.S. 366.
52. (1931) 283 U.S. 605.

but because, and only because, it has accorded with the policy of Congress thus to relieve him......The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution, but from the acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and if it be withheld, the native-born conscientious objector cannot successfully assert the privilege. No other conclusion is compatible with the well-nigh limitless extent of the war powers as above illustrated, which include, by necessary implication, the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general. In *Jacobson* v. *Massachusetts*, 197 U.S. 11, this court (upholding a State compulsory vaccination law) speaking of the liberties guaranteed to the individual by the Fourteenth Amendment said: '......and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defence.'[53]

Power of legislatures to suppress religious practices dangerous to public morals or safety. The legislature is also at liberty to suppress religious practices which are dangerous to public morals, or which are inimical to public safety, health and good order. *Davis* v *Beason* (1890) 133 U.S. 333. Polygamy may be prohibited by law, though it may be a part of one's faith. *Reynolds* v *United States* (1879) 98 U.S. 145. Mr. Justice Field in his opinion for the Supreme Court in *Davis* v *Beason*[54] in pointing out that it was not the intention of the First Amendment to create a bar to the punishment of acts inimical to the peace, good order and morals of society observed:

The oppressive measures adopted, and the cruelties and punishments inflicted by the governments of Europe for many ages, to compel parties to conform in their religious beliefs and modes of worship to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons and enforce an outward uniformity to a prescribed standard, led to the adoption of the Amend-

53. See also *Hamilton* v. *University of California* (1934) 293 U.S. 245.

54. (1890) 133 U.S. 333.

ment in question. It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations which he may think they impose, and the manner in which an expression shall be made by him of his belief in those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes as prompted by the passions of their members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretence that, as religious beliefs, their supporters could be protected in their exercise by the Constitution of the United States.

IV

Provision for ensuring a fair criminal trial

Article III: In all criminal prosecutions, whether for a Federal or a State offence, the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation against him, to have compulsory process to secure the attendance of witnesses in his behalf, and to have the assistance of counsel for his defence.

General. The object of this Article which is based upon the Sixth Amendment to the United States Constitution is to provide the essential conditions necessary for a fair trial of an accused in a criminal prosecution. I have pared down the specific constitutional safeguards to the minimum required to ensure a fair trial. Of course, there are a number of other procedural requirements now regulated by law which also contribute to the fair administration of justice. But it does not seem advisable to freeze such detailed provisions into the Constitution, especially when modifications in them may be called for by the changing needs of society. It seems to me

that the safeguards provided for in the above provision buttressed up as they will be by other provisions against bills of attainder, *ex post facto* criminal laws, double jeopardy, and unusual and cruel punishments, and by a general provision against deprivation of life or liberty without due process of law will ensure a fair administration of criminal justice in the land.

An ascertainable standard of guilt. The requirement contained in this provision that an accused person shall enjoy the right to be informed of the nature and cause of the accusation would require that a criminal offence created by a statute to be constitutionally valid should furnish a reasonably definite standard of guilt. Consequently, a criminal statute which defines the offence in such uncertain terms that persons of ordinary intelligence cannot in advance tell whether a certain action or course of conduct would be within its prohibition would be constitutionally invalid. The operation of this rule will be illustrated with reference to a few cases.

In *United States* v *Cohen Grocery Co.*,[55] the question related to the validity of a provision, contained in a statute enacted by Congress in 1917 during World-war I and known as the Lever Act, which was in these terms:

> 'That it is hereby made unlawful for any person wilfully......to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries, to conspire, combine, agree, or arrange with any other person......(e) to exact excessive prices for any necessaries......Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5000 or be imprisoned for not more than two years, or both......'.

The Cohen Grocery Company, a dealer in sugar and other necessaries in the city of St. Louis, was charged with violating this section by wilfully selling sugar at an unjust and unreasonable rate on two occasions viz., a quantity of about 50 lbs. of sugar for $10·07 and a bag containing 100 lbs. of sugar for $19·50. The Grocery Company took the plea that the section was invalid as it did not establish any ascertainable

55. (1921) 255 U.S. 81.

standard of guilt. In upholding this plea Chief Justice White in delivering the opinion of the Supreme Court observed (p. 89) :

The sole remaining inquiry, therefore, is the uncertainty of the text in question, that is, whether the words, 'That it is hereby made unlawful for any person wilfully......to make an unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted a fixing by Congress of an ascertainable standard of guilt, and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury.

In *Lanzetta* v *New Jersey*[56] the Supreme Court of the United States has held that a statute of New Jersey, penalizing 'gangsters' and declaring that 'any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime' was a gangster, was so vague and uncertain in its definition of the offence as to be repugnant to the due process clause of the Fourteenth Amendment.[57]

Assistance of counsel in criminal cases. The constitutional requirement regarding the right of an accused to the assistance of counsel would comprehend not only the right of the accused

56. (1939) 306 U.S. 451.

57. Compare this case with *Minnesota Ex Rel Pearson* v. *Probate Court* (1940) 309 U.S. 270.

to be afforded a fair opportunity to secure counsel of his own choice but also a reasonable opportunity for such counsel to take instructions from the accused and prepare for the trial of the case, *Powell* v *Alabama*.[58] And it has also been held 'that in a capital case, where defendant is unable to employ counsel, and is incapable of adequately making his own defence because of ignorance, feeble-mindedness, or illiteracy, or the like', it is the duty of court, whether requested or not, to assign counsel for him as a requisite of due process of law and also afford such counsel reasonable time to prepare the case, *Powell* v *Alabama*.[59]

V

PROVISION AGAINST THE PASSING OF BILLS OF ATTAINDER, *ex post facto* CRIMINAL LAWS AND THE INFLICTION OF CRUEL AND UNUSUAL PUNISHMENTS

Article IV: Neither the Federation nor a State shall pass any bill of attainder or *ex post facto* criminal law, or inflict cruel or unusual punishments, or subject any person to be put in jeopardy of life or limb twice for the same offence.

The nature of a bill of attainder. A bill of attainder is a legislative enactment which inflicts punishment without judicial trial. The passing of such enactments, whether by the Federal or State legislatures, is sought to be forbidden by the provision above made. The term bills of attainder would cover not only acts which inflict the penalty of death but also acts which impose lesser punishments, sometimes called bills of pains and penalties. *Cummings* v *Missouri* (1867) 4 Wall. 277.

The nature of ex post facto criminal laws. The Constitution of the United States by sections 9 and 10 of Article I forbids the passing of bills of attainder and *ex post facto* laws by the Congress as well as by the State legislatures. The

58. (1932) 287 U.S. 45.

59. (1932) 287 U.S. 45; See also *Tomkins* v. *Missouri* (1945) 323 U.S. 485.

term *ex post facto* law as used in the Constitution of the United States has been held to apply only to criminal laws and not to legislation dealing with civil rights, *Calder* v *Bull* (1798) 3 Dall. 386. In drafting the relevant provision, I have made it clear that the prohibition covers only *ex post facto* criminal laws.

In the leading case of *Calder* v *Bull*[60] Mr. Justice Chase defined *ex post facto* laws in these terms:

> I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive......But I do not consider any law *ex post facto,* within the prohibition, that mollifies the rigour of the criminal law: but only those that create or aggravate the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction.

This definition of what constitutes an *ex post facto* law has become a classic and has often been quoted and followed in later decisions. The fourth rule formulated in this case regarding subsequent statutory alterations in the rules of evidence has been somewhat qualified by later cases like *Thompson* v *Missouri* (1898) 171 U.S. 380 and *Hopt* v *Utah* (1884) 110 U.S. 574.

The case of *Thompson* v *Missouri*[61] arose out of the following facts. In a trial for murder, in order to establish the authorship of a certain prescription for strychnine and a threatening letter said to be in the handwriting of the accused, certain letters written by the accused to his wife were admitted for purposes of comparison of handwriting. The Supreme Court of Missouri, on an appeal by the accused against his

60. (1798) 3 Dall. 386.
61. (1898) 171 U.S. 380.

conviction, ruled that the admission of the letters written by him to his wife was an error, set aside the conviction and ordered a retrial. Before the second trial commenced, the legislature had enacted a law, whereby the authorship of a disputed writing was allowed to be proved by comparison 'with any writing proved to the satisfaction of the judge to be genuine.' Relying upon this provision, the letters written by the accused to his wife were again admitted in evidence for purposes of comparing them with the prescription for strychnine and the threatening letter, and the accused was also convicted. The Supreme Court of Missouri having confirmed the conviction of the accused by the trial court, the accused appealed to the Supreme Court of the United States contending, that the lower courts erred in admitting the letters as the subsequent statute of Missouri changing the rule of evidence was *ex post facto* as applied to his case. Mr. Justice Harlan delivering the opinion of the Court rejected this contention and said (pp. 382-287) :

It is not to be denied that the position of the accused finds apparent support in the general language used in some opinions. Mr. Justice Chase, in his classification of *ex post facto* laws in *Calder* v. *Bull*, 3 Dall. 386 includes 'every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence in order to convict the offender' ......This general subject was considered in *Hopt* v. *Utah*, 110 U.S. 574. Hopt was indicted, tried, and convicted of murder in the Territory of Utah, the punishment therefor being death. At the time of the commission of the offence it was the law of Utah that no person convicted of a felony could be a witness in a criminal case. After the date of the alleged offence, and prior to the trial of the case, an act was passed removing the disqualification as witnesses of persons who have been convicted of felonies. And the point was made that the statute, in its application to Hopt's case, was *ex post facto*. This court said: '......statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage, for they do not attach criminality to any act previously done, and which was innocent when done, nor aggravate any crime theretofore committed, nor provide a greater punishment therefor than was prescribed at the time of its commission, nor do they alter the degree or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.' The court added: 'The

crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of the proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offence was committed, might, in respect of that offence, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the offence, or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the crime and the amount or degree of proof essential to conviction—only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at its pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offence charged'. ......Applying the principles announced in former cases—without attaching undue weight to general expressions in them that go beyond the questions necessary to be determined—we adjudge that the statute of Missouri relating to the comparison of the writings is not *ex post facto* when applied to prosecutions for crimes committed prior to its passage. If persons excluded upon grounds of public policy at the time of the commission of the offence, from testifying as witnesses for or against the accused, may, in virtue of a statute, become competent to testify, we cannot perceive any ground upon which to hold a statute *ex post facto* which does nothing more than admit evidence of a particular kind in a criminal case upon an issue of fact which was not admissible under the rules of evidence as enforced by judicial decisions at the time the offence was committed. The Missouri statute, when applied to this case, did not enlarge the punishment to which the accused was liable when his crime was committed, nor make any act involved in his offence criminal that was not criminal at the time he committed the murder of which he was found guilty. It did not change the quality or degree of his offence......It left unimpaired the right of the jury to determine the sufficiency or effect of the evidence declared to be admissible, and did not disturb the fundamental rule that the State, as a condition of its right to take the life of an accused, must overcome the presumption of innocence, and establish his guilt beyond reasonable doubt. Whether he wrote the prescription for strychnine, or the threatening letter to the church organist, was left for the jury, and the duty of the jury, in that particular, was the same after as before the passage of the statute.

Cruel and unusual punishments. As to what would constitute a cruel and unusual punishment forbidden by this

provision, see *Weems* v *United States* (1910) 217 U.S. 349. In that case the Supreme Court held that the provision of the Phillipine penal Code, under which the falsification by a public official of a public and official document had to be punished by fine and imprisonment at hard and painful labour for a period ranging for 12 years to 20 years, the prisoner being subject, as accessories to the main punishment, to carry during his imprisonment a chain at the ankle hanging from the wrist; loss of civil rights during imprisonment and perpetual and absolute disqualification to enjoy political rights, the holding of office, and the surveillance of authorities during life, was an infringement of the provision against cruel and unusual punishments.

VI

Provision against deprivation of life or liberty by the Federation without due process of law

Article V: The Federation shall not deprive any person of his life or liberty without due process of law: but, no Federal law shall be open to challenge in a court of law as depriving a person of his liberty without due process of law, on the ground that it interferes with his freedom of contract.

This Article is based upon the due process clause of the Fifth Amendment to the Constitution of the United States, with two important modifications, however. The first is the omission of the word 'property' in the draft provision suggested; and the second is the addition of a proviso clause preventing any Federal law from being challenged as depriving a person of his liberty without due process of law, on the ground that it interferes with his freedom of contract. The reasons upon which these modifications are made have already been elaborately considered by me in the second chapter which deals with the due process clauses of the Fifth and Fourteenth Amendments.

A general provision of the kind above mentioned will strengthen the enumerated safeguards by acting as a shield protecting life and liberty—liberty in its varied aspects—of a

person from being imperilled by unreasonable laws or unreasonable modes of procedure. Certain problems arising under the due process clause as affecting life and liberty have already been considered by me in the first chapter. Some more problems of this kind will be considered by me in connexion with the parallel due process clause embodied in section 4 of the draft Article VI as a limitation upon the powers of the States.

VII

PROVISION RELATING TO FEDERAL AND STATE CITIZENSHIP, PROHIBITION AGAINST DEPRIVATION OF LIFE OR LIBERTY BY A STATE WITHOUT DUE PROCESS OF LAW, AND GUARANTEE OF EQUAL PROTECTION OF LAWS, ETC.

Article VI: Section (1) The Federal Legislature shall define by law, who shall constitute citizens of the Federation of India, natural-born and naturalized.

Section (2) A citizen of the Federation of India, who has his domicile in a State of the Federal union, is a citizen of that State.

Section (3) No State shall make or enforce any law which shall abridge the privileges or immunities of a citizen of the Federation of India, which appertain to him as such citizen.

Section (4) No State shall deprive any person of his life or liberty without due process of law: but, no law of a State shall be open to challenge in a court of law as depriving a person of his liberty without due process of law, on the ground that it interferes with his freedom of contract.

Section (5) No State shall deny to any person within its jurisdiction the equal protection of the laws: but, no taxing law of a State shall be open to challenge in a court of law, on the ground that it constitutes a deprivation of the equal protection of the laws.

Section (6) The Federal legislature shall have power to enforce by appropriate legislation the provisions of this article.

The provisions made by this article are of great importance. I shall explain why each one of those provisions has been put in and how each is likely to work in practice.

Dual citizenship in a Federation: Problem in relation to India considered. In a Federal polity operating with a dual system of government, there is necessarily a dual citizenship, citizenship of the Federation and citizenship of the State. In drafting sections 1 and 2 of this article, I have made it clear, that citizenship of the Federation is primary and that citizenship of the State is subsidiary to and derived from Federal citizenship. Every citizen of the Federation who has his domicile in a particular State is a citizen of that State.

It will be noticed that the first section which deals with Federal citizenship does not itself embody any definition of that term; but places in the hands of the Federal legislature the responsibility of defining by law who would constitute Federal citizens, natural-born and naturalized. I believe the procedure of allowing the problem of Federal citizenship to be handled by the Federal legislature is both convenient and elastic. Any adequate definition of Federal citizenship would require a complex code of provisions. Such a code would not only be too cumbrous for a Constitution but also impart to it a rigidity, a feature, hardly to be welcomed in a Constitution.

Federal and State citizenship in the United States. I think it would be well if I should indicate briefly how the problem of Federal and State citizenship and their mutual relationship has been dealt with by the Constitution and laws of the United States. Prior to the adoption of the Fourteenth Amendment in July 1868, the Constitution of the United States did not contain any definition of what constituted citizenship of the United States. The Constitution, as originally framed no doubt used the terms 'natural-born citizen of the United States' and 'citizen of the United States' in some of its provisions, but it made no attempt to clarify what those terms comprehended. After the tragic interlude of the civil war, two new amendments, the Thirteenth and the Fourteenth Amendments, were made to the Consti-

tution. By the Thirteenth Amendment the institution of slavery was abolished. And by the first clause of section 1 of the Fourteenth Amendment, a definition of United States citizenship was added, by stating, that all persons born or naturalized in the United States and subject to its jurisdiction were to be regarded as United States citizens. The object of adding such a definition was explained by Mr. Justice Gray in his opinion for the Supreme Court in *Elk* v *Wilkins*[62] in these words:

> The main object of the opening sentence of the Fourteenth Amendment was to settle the question, upon which there had been difference of opinion throughout the country and in this court, as to the citizenship of free negroes *Scott* v. *Sanford,* 19 How. 393; and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States and of the State in which they reside. *Slaughter-House Cases,* 16 Wall. 36, 73; *Strauder* v. *West Virginia,* 100 U.S. 303, 306.

Prior to the adoption of the Fourteenth Amendment, there was considerable doubt as to the exact relation of Federal citizenship to State citizenship. It had been argued by distinguished persons that State citizenship was primary and that Federal citizenship was derived from and subsidiary to State citizenship. No man, it was said, could be a citizen of the United States except on the basis of his being a citizen of one or other of the States composing the union. A logical result of this doctrine would be that a person, who was born and always resided in the District of Columbia, would not be a citizen of the United States as he was not a citizen of any State—a curious position indeed. Mr. Justice Miller in his opinion for the Court in the *Slaughter-House Cases*[63] observed:

> The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the States. No

62. (1884) 112 U.S. 94.
63. (1873) 16 Wall 36.

such definition was previously found in the Constitution, nor had any attempt been made to define it by Act of Congress. It had been the occasion of much discussion in the courts, by the executive departments and in the public journals. It had been said by eminent judges that no man was a citizen of the United States, except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether this proposition was sound or not, had never been judicially decided.

The first section of the Fourteenth Amendment by declaring that 'all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States' settled once for all the relation between Federal and State citizenship. It decreed that citizenship of the United States was the primary citizenship of the country, that State citizenship was secondary and derivative, depending upon citizenship of the United States and the citizen's place of residence. A man could be a citizen of the United States without being a citizen of a State but an important element was necessary to convert the former into the latter. While it was necessary that a person should reside within the State to make him a citizen thereof, it was only necessary for a person to be born or naturalized in the United States to be a citizen of the United States. And as Chief Justice White in the *Selective Draft Law Cases*[64] has well observed, the Fourteenth Amendment completely broadened 'the national scope of the government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative.'

Definition of United States citizenship in the Fourteenth Amendment not exhaustive. It should not be supposed, however, that the definition of national citizenship contained in the Fourteenth Amendment solved once and for all every problem connected with United States citizenship. Many difficulties remained; but most of these have now been ironed out either by judicial pronouncements or by legislative enactments. In the paragraphs that follow, I shall call attention

64. (1918) 245 U.S. 366, p. 389.

to some of the more important of the difficulties felt and the solutions which have been found for them.

Citizenship of a child born abroad of a father who is a United States citizen. The Fourteenth Amendment did not provide an exhaustive definition of citizenship but only dealt with the two cases of citizenship by birth and naturalization in the United States. It did not deal with the citizenship of a child born abroad of a father, who at the time of the child's birth was a citizen of the United States. The citizenship of such children has, from the early days of the Federation, been regulated by congressional enactments. And that position holds good even now. By an Act of Congress of 10 February, 1855 (U. S. Rev. Stat. Section 1993) it has been enacted that 'persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States; provided, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States.' And by an Act of 2 March 1907, such children born outside the limits of the United States, if they continue to reside outside the United States, are required, in order to receive the protection of the government, upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and to take the oath of allegiance to the United States upon attaining their majority.

United States citizenship by birth. The first section of the Fourteenth Amendment by the declaration that 'all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States,' contemplates two ways of acquiring citizenship, namely, by birth and naturalization. Citizenship by naturalization will be considered separately. Citizenship by birth is established by the mere fact of birth under the circumstances mentioned in the Fourteenth Amendment. Every person born in the United States and subject to its jurisdiction becomes automatically a

citizen of the United States. The construction of the words 'subject to the jurisdiction' has offered some difficulty. That children born within the United States of foreign ambassadors or diplomatic agents, or children of alien enemies born during and within their hostile occupation, are not citizens of the United States, there could be no doubt, as they could not be regarded as born 'subject to the jurisdiction' of the United States. The question has arisen whether children born in the United States of alien parents who have a permanent domicile in that country are citizens of the United States. The Supreme Court in the leading case of *United States* v *Wong Kim Ark*[65] has ruled that they are. Mr. Justice Gray delivering the opinion of the Court in that case held that a child born in the United States of parents of Chinese descent, who at the time of his birth had a permanent domicile and residence in the United States and were there carrying on a business, became at the time of his birth a citizen of the United States by virtue of the Fourteenth Amendment to the Constitution as that amendment affirmed the ancient common law doctrine of citizenship by birth within the territory and allegiance as the governing rule. Mr. Justice Gray in delivering the opinion of the Court observed (p. 655) :

> The fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called 'liegealty', 'obedience', 'faith', or 'power', of the king. The principle embraced all persons born within the king's allegiance and subject to his protection. Such allegiance and protection were mutual—as expressed in the maxim *protectio trahit subjectionem subjectio protectionem*—and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the kingdom. Children born in England of such aliens were therefore natural-born subjects. But the children born within the realm of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the King's dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction of the king.

65. (1898) 169 U.S. 649.

Mr. Chief Justice Fuller wrote a dissenting opinion which was concurred in by Mr. Justice Harlan. The Chief Justice took the view that the phrase 'subject to the jurisdiction' meant complete subjection to the political jurisdiction of the United States and not mere local and temporary allegiance exacted of resident aliens and that the children of Chinese subjects, though the parents have a permanent domicile in the United States, could not by the mere fact of birth in the United States become its citizens. The doctrine propounded by the majority in the *Wong Kim Ark* case that the Fourteenth Amendment enacts the rule of country of birth, *jus soli,* and not the rule of descent of blood, *jus sanguini,* is firmly established and holds the field to-day.

United States Citizenship by naturalization. Naturalization is the process by which an alien is converted into a citizen. Ordinarily, naturalization is an individual affair, a process by which an alien, by conforming to the provisions of appropriate Federal statutes, is accorded the status of a citizen. But there can be collective naturalization also. On the annexation of Texas to the United States as a new State of the Federal union, all the citizens of the former Republic of Texas automatically became citizens of the United States, *Contzen* v *United States.*[66] By an act of Congress of 30 April 1900, 'all persons who were citizens of Hawaii on 12 August, 1898' the day on which its sovereignty was transferred to the United States, were collectively 'declared to be citizens of the United States and citizens of the Territory of Hawaii.'

Marriage and United States citizenship. Under the Congressional Act of 2 March 1907, an American-born woman who married a foreigner forfeited her American citizenship and took the nationality of her husband even though she continued to reside in the United States, *Mackenzie* v *Hare* (1915) 239 U. S. 299. But this position has been altered by an Act of Congress dated 22 September 1922, 42 Stat. 1021, which makes important changes in the previous rules affecting the citizenship of women. Under the Act of 1922, the

66. (1900) 179 U.S. 191.

position is substantially this: (1) An alien woman is not ineligible to naturalization because she is a woman or is married. It is consequently possible for an alien woman to acquire United States citizenship although her husband continues to be a foreign subject. (2) An American woman who marries an alien does not cease to be a citizen by reason of her marriage unless she formally renounces her citizenship. But if an American woman marries an alien who is not himself eligible under the laws to acquire United States citizenship, then she loses her American citizenship. (3) An American woman who has lost her citizenship through marriage with an alien may regain it by naturalization. (4) The marriage of an alien woman to an American citizen does not give her the status of an American citizen. But she can acquire such status by naturalization.

Expatriation. By the act of 27 July 1868, Congress has declared that 'the right of expatriation is a natural and inherent right of all people.' There is, therefore, no legal bar against a citizen of the United States, whether natural-born or naturalized, abandoning his United States citizenship and acquiring a foreign citizenship.

It has been held that since expatriation is the voluntary renunciation or abandonment of nationality and allegiance, that principle can have no application to the removal from the United States of a native-born citizen of the United States by his parents during his minority to the country wherefrom his parents had originally come. The essence of expatriation being voluntary renunciation of citizenship, a minor in virtue of his minority is deemed incapable of exercising that right.

An interesting case was recently decided by the Supreme Court and is reported as *Perkins* v *Elg.*[67] The facts of this case were these. Miss Elg was born in Brooklyn, New York, on 2 October 1907. Her parents who were formerly natives of Sweden had crossed over to the United States sometime prior to 1906 and her father also had become naturalized there in that year. Her mother took her back to Sweden in 1911,

67. (1939) 307 U.S. 325.

where she continued to reside until 7 September 1929. Her father also had gone back to Sweden in 1922 and had resided there ever since. In 1934, the father made a statement before an American consul in Sweden that he had voluntarily expatriated himself, that he did not desire to retain his United States citizenship, and that he wished to resume his allegiance to Sweden. Miss Elg shortly before she became twenty-one years of age enquired of an American consul in Sweden about returning to the United States and was told that if she wished to return she could do so under an American passport. In 1929, within eight months after attaining majority, she returned to the United States under an American passport issued under instructions of the Secretary of State and had resided there ever since. In 1935, the Department of Labour threatened her with expulsion on the ground that she was an alien and was illegally in the United States. In July 1936, she applied for an American passport and was refused on the sole ground that she was not a citizen of the United States. She then commenced an action against the Secretary of Labour and other officials for a declaration that she was a citizen of the United States entitled to all the rights and privileges of citizenship and for an injunction against the Secretary of Labour restraining him from deporting her, as well as for other incidental reliefs. There was no doubt that under the Fourteenth Amendment, the plaintiff, on her birth in New York, became automatically a citizen of the United States. The problem to be solved in this case was put in this way by Chief Justice Hughes in his opinion for the Court (p. 329) :

As municipal law determines how citizenship may be acquired, it follows that persons may have a dual nationality. And the mere fact that the plaintiff may have acquired Swedish citizenship by virtue of the operation of Swedish law, on the resumption of that citizenship by her parents, does not compel the conclusion that she has lost her own citizenship acquired under our law. As at birth she became a citizen of the United States, that citizenship must be deemed to continue unless she has been deprived of it through the operation of a treaty or congressional enactment or by her voluntary action in conformity with applicable legal principles.

The learned Chief Justice pointed out that it had long been a recognized principle in the United States that if a child born there was taken during minority to the country of the parents' origin, where his parents resumed their former allegiance, he did not thereby lose his citizenship in the United States, provided that, on attaining majority, he elected to retain that citizenship and to return to the United States to assume its duties. That position, the Chief Justice pointed out, had not been altered by any statutory law. Nor had the naturalization treaties between the United States and Sweden effected any change in this respect. Moreover, the plaintiff, being a minor, could not during minority expatriate herself, as expatriation was a voluntary act, which could not be imputed to an infant during minority. For all these reasons, the plaintiff, the Court ruled, had not lost her citizenship of the United States and was entitled to all the rights and privileges of that citizenship.

Citizenship of a Federal unit in India to depend upon a person's domicile therein. In the second section of the draft Article, I have deliberately used the word 'domicile' instead of the word 'residence' which occurs in the Fourteenth Amendment. It seemed to me better to make domicile instead of mere residence the test of state citizenship as the person claiming the citizenship of a particular State should have the intent to regard that State as his home State. Of course, there is nothing to bar him from changing his domicile from one State to another. Mr. Justice Jackson in his dissenting opinion in the recent case of *Williams* v *North Carolina*[68] has expressed the view that the framers of the Fourteenth Amendment had probably used the word residence as synonymous with domicile. He has observed (p. 322) :

> Domicile means a relationship between a person and a locality. It is the place, and the one place, where he has his roots and his real, permanent home. The Fourteenth Amendment, in providing that one by residence in a State becomes a citizen thereof, probably used

68. (1942) 317 U.S. 287.

'residence' as synonymous with domicile. Thus domicile fixes the place where one belongs in our Federal system.

Bar against State abridgement of privileges and immunities of Federal citizenship. The third section of this Article, is based upon a similar provision contained in section 1 of the Fourteenth Amendment running thus: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' The construction of this clause was a matter of acute controversy in the famous *Slaughter-House Cases.*[69] There, Mr. Justice Miller speaking for the majority of his colleagues said, that the privileges and immunities which were protected against abridgement by the States were only those which belonged to a citizen of the United States as such, that is to say, to the limited class of interests growing out of the relationship between the citizen and the national government created by the Constitution and Federal laws. The section as drafted by me is intended to give effect to the view of the majority in the *Slaughter-House Cases,* a view which has been consistently maintained by the United States Supreme Court in later cases.

In 1869, the legislature of Louisiana, with the professed purpose of protecting the health of the City of New Orleans, passed an Act incorporating The Crescent City Livestock Landing and Slaughter-House Company, and granting to it the monopoly for a period of twenty-five years of conducting slaughter-houses, stock-yards and their appurtenances in that City. The effect of this statute was to put an end to more than a thousand previously established businesses. Suits were filed by various butchers who were affected by the statute to prevent its enforcement on the ground that it was unconstitutional. The primary contention urged against the constitutionality of the statute was that it abridged the privileges and immunities of citizens of the United States. Mr. Justice Miller in his opinion for the Court holding that there was a distinction between privileges and immunities which belonged to a citizen of the United

69. (1873) 16 Wall. 36.

States as such, and those which belonged to him as the citizen of a State as such, and that the right to conduct a butcher's business did not appertain to United States citizenship and was not covered by the privileges and immunities clause of the Fourteenth Amendment said:

It is quite clear, then, that there is a citizenship of the United States, and a citizenship of the State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual. We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same Section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favour of the plaintiffs, rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same ......Of the privileges and immunities of the citizen of the United States and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment. If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.

Mr. Justice Field in a powerful dissenting opinion held that the amendment had in view the natural and inalienable rights which belonged to citizens of all free governments; and that among such rights must be placed the right to pursue a lawful employment including the avocation of a butcher, without other restraints than such as equally affected all persons. He added:

If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to the citizens of the United States, it was a vain and idle enactment, which accomplished nothing and most unnecessarily

excited Congress and the people on its passage. With privileges and immunities thus designated no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference.

Mr. Chief Justice Chase, Mr. Justice Swayne and Mr. Justice Bradley concurred in the dissenting opinion of Mr. Justice Field.

If a construction of the privileges and immunities clause of the Fourteenth Amendment wider than the one actually adopted by the majority had prevailed, then there was little doubt that it would have seriously menaced the autonomy of the States in many directions. The attempts made on later occasions to widen the scope of this clause have uniformly failed. As Mr. Justice Stone in his dissenting opinion in *Colgate* v *Harvey*[70] has observed (pp. 445-446) :

The reason for this reluctance to enlarge the scope of the clause has been well understood since the decision in the *Slaughter-House Cases*, 16 Wall. 36. If its restraint upon State action were extended more than is needful to protect relationships between the citizen and the national government, and it did more than duplicate the protection of liberty and property secured to persons and citizens by the other provisions of the Constitution, it would enlarge judicial control of State action and multiply restrictions upon it to an extent difficult to define, but sufficient to cause serious apprehension for the rightful independence of local government. That was the issue fought out in the *Slaughter-House Cases*, supra, with the decision against the enlargement. Since the adoption of the Fourteenth Amendment at least fourty-four cases have been brought to this court in which State statutes have been assailed as infringements of the privileges and immunities clause. Until today none has held that State legislation infringed that clause.

The decision of the Supreme Court in the *Slaughter-House Cases*, has had a healthy influence on the maintenance of a well-balanced Federal system in the United States. If the decision was other than what it was, 'the States' as Mr. Charles Warren has observed, 'would have largely lost their autonomy, and become as political entities, only of historical interest.'[71]

70. (1935) 296 U.S. 404.

71. Charles Warren, *The Supreme Court in United States History*, Vol. 2 (Rev. ed.) p. 547.

The nature of the privileges and immunities of a Federal citizen qua such citizen. Now the question may be asked what are the privileges and immunities which belong to a citizen of the Federation of India *qua* such citizen, which a State would not be competent to abridge under the terms of section 3 of this article? In answering this question, we can get considerable assistance from the decisions of the United States Supreme Court which have dealt with a parallel provision contained in section 1 of the Fourteenth Amendment.

Mr. Justice Miller in his opinion for the Court in the *Slaughter-House cases* gave a general idea of the privileges and immunities belonging to the citizen of the United States as such, in these words:

> One of these is well described in the case of *Crandall* v. *Nevada*, 6 Wall. 35. It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, 'to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justice in the several States.' And quoting from the language of Chief Justice in another case, it is said 'that, for all the great purposes for which the Federal government was established, we are one people, with one common country, we are all citizens of the United States;' and it is, as such citizens, that their rights are supported in this court in *Crandall* v. *Nevada*. Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, and all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State. To these may be added the rights secured by the thirteenth and fifteenth articles of the

amendment, and by the other clause of the fourteenth, next to be considered.

Mr. Justice Moody in *Twining* v *New Jersey*[72] referred to some of the rights and privileges belonging to citizenship of the United States as follows (p. 97) :

Thus among the rights and privileges of national citizenship recognized by this court are the right to pass freely from State to State, *Crandall* v. *Nevada*, 6 Wall. 35; the right to petition Congress for a redress of grievances, *United States* v. *Cruikshank*, 92 U.S. 542; the right to vote for national officers, *Ex parte Yarbrough*, 110 U.S. 651; *Wiley* v. *Sinkler*, 179 U.S. 58; the right to enter public lands, *United States* v. *Waddell*, 112 U.S. 76; the right to be protected against violence while in the lawful custody of the United States marshal, *Logan* v. *United States*, 144 U.S. 263; and the right to inform the United States authorities of violation of its laws, *In re quarles*, 158 U.S. 582.

In *Colgate* v *Harvey*[73] Mr. Justice Sutherland speaking for the Supreme Court has held that a provision in the Vermont Income tax statute, by which, if a citizen resident in Vermont loaned his money at 5% or less in another State he had to pay tax upon the income derived, while if he loaned money in Vermont at the same rate, no tax whatever was leviable, was a discriminatory provision abridging the privilege of a citizen of the United States to loan his money and make contracts with respect thereto in any part of the United States. Mr. Justice Sutherland observed (p. 433) :

......when a citizen of the United States resident in Vermont goes into New Hampshire, he does not enter foreign territory, but passes from one field into another field of the same domain. When he trades, buys or sells, contracts or negotiates across the State line, when he loans money, or takes out insurance in New Hampshire—whether in doing so he remains in Vermont or not—he exercises rights of national citizenship which the law of neither State can abridge without coming into conflict with the supreme authority of the Federal constitution.

In *Hague* v *Committee for Industrial Organization*[74] the Supreme Court has held that the right to discuss national

72. (1908) 211 U.S. 78.
73. (1935) 296 U.S. 404.
74. (1939) 307 U.S. 496.

legislation is a privilege belonging to a citizen of the United States and is protected from abridgement by the States under the Fourteenth Amendment.

The right to become a candidate for State office is a right or privilege of State citizenship and not of national citizenship which alone is protected by the privileges and immunities clause, *Snowden* v *Hughes*.[75]

Due process of law as a limitation on exercise of State power. The fourth section of this article is based upon the due process clause of the Fourteenth Amendment to the Constitution of the United States. In drafting this section two important departures from the American provision have been made, namely, the word 'property' occurring therein has been omitted and a clause not found in it, providing that no State law shall be open to challenge as depriving a person of his liberty on the ground that it interferes with his freedom of contract has been newly added. The reasons for these two changes in the original American clause have already been stated by me in the second chapter dealing with the due process clauses of the Fifth and Fourteenth Amendments.

The due process clause as embodied in the fourth section of the present article will be a valuable safeguard for the life and liberty of an individual against arbitrary or unreasonable legislative, executive or judicial action of a State.

What constitutes due process of law. The phrase 'due process of law" occurring in the Fourteenth Amendment has been identified with the expression 'law of the land' occurring in the provision of the Magna Carta which provides: 'No freeman shall be taken or imprisoned, or disseized, or outlawed, or exiled, or in any way destroyed, nor will we go upon him, nor will we send upon him, unless by the lawful judgement of his peers or the law of the land.' When the great barons of England wrung from King John at Runnymede the assurance that their lives and property would not be disposed of by the Crown, except as provided by the 'law of the land',

75. (1944) 321 U.S. 1.

they meant by the expression 'law of the land' the ancient and customary laws of the English people or the laws enacted by Parliament of which they, the barons, were the controlling element. It never occurred to them that Parliament itself might trample upon cherished rights and that safeguards for the abuse of legislative power by that authority would be necessary. The Supreme Court has made it clear that the phrase 'due process of law' occurring in the Fifth and Fourteenth Amendments should not be equated in point of its legal content with the words 'law of the land' occurring in the Magna Carta. It has held, that even laws emanating from a legislature, Federal or State, though professedly enacted in the public interest, may be scrutinized by the courts and may be set aside by them, if they reached the conclusion that they constituted arbitrary or unreasonable deprivations of the life or liberty of individuals. The Supreme Court has shown great reluctance to give a comprehensive definition of what constitutes 'due process of law' believing that it is wisdom to ascertain the intent and application of that dynamic phrase by the gradual process of judicial inclusion and exclusion.

Due process of law in relation to life and liberty. The Supreme Court has held that the constitutional guarantee of due process of law, as applied to criminal prosecutions would require that the accused be given a fair trial. A trial dominated by a mob, the jury having no chance to exercise its independent judgement, although conforming to the prescribed forms of judicial procedure, is not a fair trial and a conviction made at such a proceeding is a denial of due process of law, *Moore* v *Dempsey*;[76] *Powell* v *Alabama*.[77] A conviction of an accused based upon a coerced confession or upon a plea of guilty secured by misrepresentation is invalid as contravening due process of law, *Brown* v *Mississippi*;[78] *Chambers* v

76. (1923) 261 U.S. 86.
77. (1932) 287 U.S. 45.
78. (1936) 297 U.S. 278.

Florida;[79] *White* v *Texas;*[80] *Smith* v *O'Grady;*[81] *Ashcraft* v *Tennessee.*[82]

It has been held that the requirement of due process does not compel the adoption of any particular form of procedure, but leaves to each State a wide discretion in the matter, 'subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.' *Brown* v *New Jersey.*[83] The Supreme Court in construing the constitutional guarantee of due process of law contained in the Fourteenth Amendment has held that in prosecutions by a State, presentment or indictment by a grand jury may give way to a proceeding by information after examination and commitment by a magistrate, certifying to the probable guilt of the accused, *Hurtado* v *California.*[84] The States may, if they like, abolish jury trials altogether, *Walker* v *Sauvinet,*[85] modify the constitution of juries, *Maxwell* v *Dow,*[86] end the privilege against self-incrimination, *Twining* v *New Jersey.*[87]

Mr. Justice Cardozo delivering the opinion of the court in *Palko* v *Connecticut*[88] has observed (pp. 325-326) :

> The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Snyder* v. *Massachusetts, supra* (291 U.S. p. 105)...... Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What

79. (1940) 309 U.S. 227.
80. (1940) 310 U.S. 530.
81. (1941) 312 U.S. 329.
82. (1944) 322 U.S. 143.
83. (1889) 175 U.S. 172, p. 175.
84. 1884) 110 U.S. 516.
85. (1875) 92 U.S. 90.
86. (1900) 176 U.S. 581; See, however, the powerful dissenting opinion of Harlan J., pp. 609-13, arguing contra.
87. (1908) 211 U.S. 78.
88. (1937) 302 U.S. 319.

is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. *Twining* v. *New Jersey,* 211 U.S. 78. This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. *Brown* v. *Mississippi,* 297 U.S. 278.

We have already noticed in the first chapter the broad connotation which the Supreme Court of the United States has given to the word 'liberty' which occurs in the Fourteenth Amendment. Liberty does not stand merely for the right of an individual to be free from the physical restraint of his person or incarceration. It has been held to comprehend the right of an individual to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to acquire useful knowledge, to marry, establish a home, bring up children and to worship god as he chooses, *Allgeyer* v *Louisiana*[89] and *Meyer* v *Nebrasaka.*[90] Liberty, in all these varied phases, is not however an absolute one. Liberty does not imply that an individual could be free from all restraints; all that it can mean is, that restraints imposed by society should not be arbitrary or unreasonable. As to how far a State might go in curtailing a man's liberty in the larger interests of society is not easily determined. In the last resort, it is for the courts to decide whether any restraint imposed by legal enactments upon individual liberty is arbitrary and unreasonable and thus a contravention of due process of law, or is fair and reasonable and therefore a proper exercise of State police power consistent with the constitutional requirement of due process. Cases like *Meyer* v *Nebraska*[91] and *Pierce* v *Society of Sisters*[92] discussed in the first chapter, and *Skinner* v *Oklahoma*[93] considered in the second chapter, in connexion with the general

89. (1897) 165 U.S. 578, p. 589.
90. (1923) 262 U.S. 390, p. 399.
91. (1923) 262 U.S. 390.
92. (1925) 268 U.S. 510.
93. (1942) 316 U.S. 535.

examination of the due process provisions, give an indication as to the way in which judicial tribunals work in this field and afford protection to valuable human rights when they are sought to be arbitrarily controlled by State action.

Equal protection of the laws. The fifth section of this article providing for equal protection of the laws is based upon a similar provision which is found in the Fourteenth Amendment to the Constitution of the United States. But one modification not found in the parallel American provision has been made by me, namely, that State taxing laws should not be open to challenge in a court of law as deprivation of equal protection of the laws. The reasons for this modification will be mentioned later.

It will be my endeavour in the paragraphs that follow to indicate briefly how the equal protection of the laws clause in the American constitution has worked in practice. Although the clause itself appears to be a simple and straightforward one, numerous questions have arisen in regard to the application of the clause to concrete situations. As the judicial literature bearing upon this topic is an extensive one, it will not be possible for me to give here more than a cursory sketch of the way in which that clause has operated in the complicated conditions of modern society.

The general object of this provision, as Mr. Chief Justice Taft pointed out in *Truax* v *Corrigan*[94] was to make the whole system of law rest upon the ' fundamental principle of equality of application of the law'. 'The guarantee', he said, 'was aimed at undue favour and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality on the other.'

But it has been held that the clause in question does not preclude legislative classification provided it is reasonable and not arbitrary, because most legislation involves classification of some kind or other. As Mr. Chief Justice Taft delivering the opinion of the Court in *Truax* v *Corrigan* has observed (pp. 337-338) :

94. (1921) 257 U.S. 312.

In adjusting legislation to the need of the people of a State, the legislature has a wide discretion and it may be fully conceded that perfect uniformity of treatment of all persons is neither practical nor desirable, that classification of persons is constantly necessary and that questions of proper classification are not free from difficulty. But we venture to think that not in any of the cases in this court has classification of persons of sound mind and full responsibility, having no special relation to each other, in respect of remedial procedure for an admitted tort been sustained. Classification must be reasonable. As was said in *Gulf, Colorado* and *Santa Fe Ry. Co.* v. *Ellis,* 165 U.S. 155, classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without such basis.' ......Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconsciously exercising it. It must therefore obtain in and determine legislation; but it must regard real resemblances and real differences between things, and persons, and class them in accordance with their pertinence to the purpose in hand.

Equal protection of laws and exclusion of negroes from juries. The systematic exclusion of negroes from grand and petit juries has been held to be a denial of equal protection of the laws. So far back as the year 1880 in the leading case of *Strauder* v *West Virginia*[95] the Supreme Court speaking through Mr. Justice Strong held that a West Virginia statute which limited jury service to only white persons was a palpable discrimination against coloured people and that a trial of a negro for his life by a jury drawn from a panel from which the State had expressly excluded every man of his race, solely on the ground of colour, was a denial to him of equal legal protection contrary to the Fourteenth Amendment.

In a recent case, *Pierre* v *Louisiana,*[96] the Supreme Court set aside the conviction of a negro holding that the indictment for murder upon which he had been tried was unconstitutional as contravening the equal protection of the laws, as the State, while making presentment or indictment by a grand jury a prerequisite to being held to answer for a capital crime, had systematically excluded negroes on account of race from the *venire* from which the grand jury was drawn.

95. (1880) 100 U.S. 303.
96. (1939) 306 U.S. 354.

Although a State statute dealing with the selection of persons for jury service does not itself contain any discrimination between the two races, if in the actual working of it a discrimination has been made, the Supreme Court will get behind the facade of the law to see if the constitutional right of equality of protection has been denied, *Norris* v *Alabama*,[97] *Pierre* v *Louisiana*.[98]

Equal protection of laws not regarded in the United States as guaranteeing equality in social relations. The Supreme Court has held that the equal protection of the laws was not 'intended to abolish distinctions based upon colour, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms satisfactory to either'.[99] It has accordingly held that laws providing for the segregation of negroes from whites in regard to travel in railway carriages by providing separate compartments, and the education of negroes and whites in separate schools, do not infringe the constitutional requirement of equal protection of the laws, provided there is no inequality in the facilities provided to the two races, *Plessy* v *Ferguson*,[100] *Mitchell* v *United States*,[101] *Berea College* v *Kentucky*.[102]

97. (1935) 294 U.S. 587.
98. (1939) 306 U.S. 354.
99. per Brown J., in *Plessy* v. *Ferguson* (1896) 163 U.S. 537.
100. (1896) 163 U.S. 537; As the text of the opinion delivered by the Supreme Court on 3 June, 1946, in the Virginia 'Jim Crow' law case has not yet come to hand, I am not in a position to make a detailed comment on it. This case came on appeal by a negro girl who had been fined ten dollars for refusing to sit in the Jim Crow section of a Norfolk-Baltimore bus. The conviction was set aside by the Supreme court. The American weekly newsmagazine *Time* dated 10 June 1946, has the following comment on this case: 'This week seven nimble Justices ducked the racial question and settled everything on the basis of comfortable travelling....Said Justice Reed, of Kentucky: Segregation imposes an undue burden on interstate commerce.....The Justices held that segregation on interstate buses is illegal. On buses which operate within one State Jim Crow seating is still all right. That is the States' business.'
101. (1941) 313 U.S. 80.
102. (1908) 211 U.S. 45.

Equal protection of laws in regard to facilities in educational institutions. It has been held that where educational facilities are provided for members of one race but denied to members of another race, then there is a violation of the constitutional guarantee against deprivation of equal protection of the laws. The important case of *Missouri Ex Rel. Gaines* v *Canada*[103] is an excellent illustration of this principle. This case concerned the right of a negro student by name Lloyd Gaines, who had graduated with the degree of Bachelor of Arts at the Lincoln University, an institution maintained by the State of Missouri for the higher education of negroes, to be admitted to the Law school of the University of Missouri. The Lincoln University had no law school. Although the petitioner Gaines by his work and credits at the Lincoln University was qualified for admission to the school of law of the University of Missouri, he was refused admission upon the ground that it was 'contrary to the Constitution, laws and public policy of the State to admit a negro as a student in the University of Missouri.' Under a statute in force in Missouri, provision had been made for the payment of tuition fees at the University of any adjacent State for any negro residents in the State to take any course or to study any subjects which was provided at the State University for white students but which was denied to negro students solely on account of their colour. The State universities of the four neighbouring States of Kansas, Nebraska, Iowa and Illinois had schools of law to which non-resident Negro students were admitted. The petitioner Lloyd Gaines was advised to ask for aid under the provisions of the statute aforesaid. The petitioner was, however, unwilling to join a law school in a neighbouring State and brought an action for mandamus to compel the curators of the University of Missouri to admit him to the School of Law of that University contending that their refusal to take him as a student constituted a denial by the State of the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Con-

103. (1939) 305 U.S. 337.

stitution. The Circuit Court having denied relief, the petitioner carried his case to the Supreme Court of Missouri. As this Court also refused to interfere, he obtained a writ of certiorari from the Supreme Court of the United States. Mr. Chief Justice Hughes in delivering the opinion of the Court reversing the judgement of the Missouri Supreme Court observed as follows (pp. 349-350):

> The basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of colour......The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination. The equal protection of the laws is 'a pledge of the protection of equal laws.' *Yick Wo* v. *Hopkins*, 118 U.S., 356, 369. Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities,—each responsible for its own laws establishing the rights and duties of persons within its borders. It is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do......We find it impossible to conclude that what otherwise would be an unconstitutional discrimination, with respect to the legal right to the enjoyment of opportunities within the State, can be justified by requiring resort to opportunities elsewhere. That resort may mitigate the inconvenience of the discrimination but cannot serve to validate it.

A careful perusal of the opinion of Mr. Chief Justice Hughes for the Supreme Court makes it clear that the decision was rested upon the main ground that the State of Missouri having created facilities for legal education within its bounda-

ries for white students at the University of Missouri could not deny those facilities to negro students because of their colour. It is also manifest from his opinion that had Lincoln University itself made provision for the teaching of law, a negro student could not have insisted upon admission to the School of Law of the University of Missouri because the furnishing of substantially equal facilities for higher education to negroes and whites in separate institutions would be an adequate compliance of the constitutional requirement of equal protection of the laws.

Equal protection of laws in regard to amenities in public transports. Although the Supreme Court has ruled that the requirement of equal protection is satisfied by providing separate but equal facilities in railway carriages and educational institutions for whites and negroes, it has also ruled that the provision of such facilities cannot be conditioned upon there being adequate demand for them by negroes. As Mr. Justice Hughes in delivering the opinion of the Supreme Court in *McCabe* v *Atchison, Topeka & Sant Fe Ry. Co.*[104] has observed (pp. 161-162):

> It is not questioned that the meaning of this clause is that carriers may provide sleeping cars, dining cars and chair cars exclusively for white persons and provide no similar accommodation for negroes. The reasoning is that there may not be enough persons of African descent seeking these accommodations to warrant the outlay in providing them......This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but if facilities are provided, substantial equality of treatment of persons travelling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a State law, a facility or convenience in the course of his journey which, under substantially the same circumstances, is furnished to another traveller,

104. (1914) 235 U.S. 151.

he may properly complain that his constitutional privilege has been invaded.[105]

The principle above enunciated was reaffirmed by Chief Justice Hughes in his opinion for the Court in *Missouri Ex Rel. Gaines* v *Canada*[106] where he said (pp. 350-351):

> Nor can we regard the fact that there is but a limited demand in Missouri for the legal education of negroes as excusing the discrimination in favour of whites......Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity.

Segregation of persons in railways, theatres, etc., on grounds of colour, race, etc., not desirable. The segregation of negroes and whites in educational institutions, theatres and railways, though both are given the same kind of amenities, is not conducive to good relations between the two races. The view adopted by the Supreme Court of the United States that such segregation is in no way an infringement of the equal protection of the laws guaranteed by the Fourteenth Amendment seems to my mind to be not in accord with the letter and spirit of the equality clause which was part of the guarantee written into the Constitution in order to secure equal rights and privileges to the newly emancipated negro after the civil war. It seems to me that it would be wise to make specific and clear provision in the future Indian Constitution preventing any discrimination being practised in educational institutions, theatres, public conveyances, hotels and places of amusement on the basis of race, religion, caste, community or colour. I shall revert to this subject when I deal with the appropriate article which I suggest as suitable for incorporation into the future Constitution of India.

105. See also the observations of Hughes C.J., in *Mitchell* v. *United States* (1941) 313 U.S. 80, pp. 96-7.

106. (1939) 305 U.S. 337.

Equal protection of laws not inconsistent with reasonable legislative classifications. We have already noticed the principle that the States in enacting legislation are not prevented by the equal protection of laws clause from making classifications which are reasonable in the public interest. It is not possible to deal here with the numerous cases which have come to the courts upon the reasonableness of such classifications. Two examples will, however, be given to show how such questions are viewed by the courts.

It has been held that a State legislature may establish reasonable regulations limiting the height of buildings in cities, and the constitutional requirement of equal protection of the laws is not infringed by the establishment of different maximum heights for the commercial and residential districts, respectively, *Welch* v *Swasey*.[107]

In the recent case *Tigner* v *Texas*[108] the Supreme Court overruled its earlier decision in *Connolly* v *Union Sewer Pipe Co.*[109] and held that the exemption of agricultural activities from the operation of the criminal provisions of a State Anti-Trust Act did not render the Act unconstitutional as a denial of equal protection of the laws. Mr. Justice Frankfurter in delivering the opinion of the Court observed (pp. 146-147):

> At the core of all these enactments lies a conception of price and production policy for agriculture very different from that which underlies the demands made upon industry and commerce by anti-trust laws. These various measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process. Certainly there are differences which may be acted upon by the law-makers. The equality at which the 'equal protection' clause aims is not a disembodied equality. The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as

107. (1909) 214 U.S. 91.
108. (1940) 310 U.S. 141.
109. (1902) 184 U.S. 540.

though they were the same. And so we conclude that to write into law the differences between agriculture and other economic pursuits was within the power of the Texas legislature. Connolly's case has been worn away by the erosion of time, and we are of opinion that it is no longer controlling.

Equal protection of laws in relation to aliens. The Supreme Court has held that the guarantee of equal protection of the laws can be invoked by aliens also under certain circumstances. In the famous case of *Yick Wo* v *Hopkins*,[110] a case already considered in the first chapter, an ordinance of the City of San Francisco regulating laundry establishments, which though fair on its face, was operated in such a way as to cause manifest injustice to Chinese laundrymen, was held to violate the constitutional guarantee of equal protection of the laws. In *Truax* v *Raich*[111] Mr. Justice Hughes speaking for the Supreme Court held that a statute of Arizona which required that in establishments where five or more persons were employed, 80 per cent of the employees must be qualified electors or native-born citizens of the United States, was a denial of equal protection of the laws, and that a native of Austria who was not a qualified elector in Arizona but who was resident in that State and employed as a cook in a restaurant, seven of whose nine employees were neither native-born citizens nor qualified electors, was entitled to an injunction against the enforcement of the statute as he was about to be discharged from employment. The case was rested upon the ground that the 'right to work for a living in the common occupations of the community was of the very essence of personal freedom' and that if this right were to be denied to a person on the ground of his alienage 'the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.' It has been held, however, that a statute which prohibited ownership or other interest in land to be transferred to aliens in a State, who have not declared their intention to become citizens or who are ineli-

110. (1886) 118 U.S. 356.
111. (1915) 239 U.S. 33.

gible to citizenship, is not a contravention of equal protection of the laws, as the rights, privileges and duties of aliens differ widely from those of citizens, the citizen being even compellable to render military service, *Terrace* v *Thompson*,[112] *Webb* v *O'Brien*.[113] A State may also exclude an alien from the privilege of maintaining a pool or a billiard room, *Clarke* v *Deckebach*,[114] and also make it unlawful for an alien to kill any wild bird except in defence of person and property, and to that end making it unlawful for such alien to possess, or to own a shotgun or rifle, *Patsone* v *Pennsylvania*.[115]

Equal protection of laws and taxing statutes. The clause in the Fourteenth Amendment which prohibits the States from denying to any person the equal protection of the laws has been held to be applicable to State taxing statutes also. Great difficulty has been felt by the courts in defining with precision the principles upon which this problem has to be resolved in relation to State taxation measures. Mr. Justice McKenna in delivering the opinion of the Supreme Court in *Magoun* v *Illinois Trust & Savings Bank*[116] referred to this problem in these words (p. 293):

> What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.' *Kentucky Railroad Tax Cases*, 115 U.S. 321, 337. It does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed. *Hayes* v. *Missouri*, 120 U.S. 68......But what is the test of likeness and unlikeness of circumstances and conditions? These expressions have almost the generality of the principle they are used to expound, and yet they are definite steps to precision and usefulness

112. (1923) 263 U.S. 197.
113. (1923) 263 U.S. 313.
114. (1927) 274 U.S. 392.
115. (1914) 232 U.S. 138.
116. (1898) 170 U.S. 283.

of definition, when connected with the facts of the cases in which they are employed.

In view of the paramount importance of the taxing power to the proper functioning of the States, the courts have not been so rigorous in the application of the equal protection of the laws clause of the Fourteenth Amendment to taxing statutes as they have been to ordinary legislative measures. A wide measure of discretion has been allowed in regard to the selection of the modes of taxation, the subjects to be taxed and the distribution of tax burdens. Classifications made by the States for taxation purposes have been generally upheld unless they have been manifestly arbitrary or unreasonable. As Mr. Justice Roberts in delivering the opinion of the Court in *State Bd. of Tax Commissioners* v *Jackson*[117] has observed (pp. 537-538):

> The power of taxation is fundamental to the very existence of the government of the States. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations......The fact that a statute discriminates in favour of a certain class does not make it arbitrary, if the discrimination be founded upon a reasonable distinction......or, if any state of facts reasonably can be conceived to sustain it......It is not the function of this Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives, or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified.[118]

While general principles are fairly well settled, their application to concrete situations has presented difficulties. And there have been many cases in which the Supreme Court has sustained or vetoed State taxing measures attacked as

117. (1931) 283 U.S. 527.

118. See also *Charleston Association* v. *Alderson* (1945) 324 U.S. 182, observations of Stone, C.J., pp. 190-91.

violating the equal protection of the laws by narrow majorities.[119]

Taxation measures to be taken out of the purview of equal protection of laws. If the equal protection of the laws clause is allowed to stand unqualified in the Indian Constitution, there could be no doubt that it would lead to considerable litigation calling into question State taxing laws as contraventions of this clause. It seems to me that it would be better for us to leave the exercise of the State taxing power, in a manner which is both fair and equitable, to the unfettered discretion of the legislature, instead of allowing the courts to exercise a wide control over such legislation by testing their constitutional validity with reference to a fluid and uncertain standard like the equal protection of the laws. Such a course would prevent a great deal of speculative and expensive litigation. For all these reasons, I have considered it desirable to add a saving clause to section 5 preventing State taxing laws being challenged in courts as constituting deprivation of the equal protection of the laws.

The sixth section of the draft provision corresponds to the fifth section of the Fourteenth Amendment to the Constitution of the United States. An example of congressional exercise of this power is furnished by section 43 of Title 8 of the United States Code which provides:

> Any person who, under colour of any statute, ordinance, regulation, custom, or usage, of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.[120]

119. See for example *State Bd. of Tax Commissioners* v. *Jackson* (1931) 283 U.S. 527; *Fox* v. *Standard Oil Co.* (1935) 294 U.S. 87; *Great Atlantic and Pacific Tea Co.* v. *Grosjean* (1937) 301 U.S. 412.

120. See the opinion of Roberts J., in *Hague* v. *Committee for Industrial Organization* (1939) 307 U.S. 496, p. 510.

VIII

PROVISION FOR ENSURING EQUAL FACILITIES TO ALL PERSONS WITHOUT REGARD TO RELIGION, RACE, COLOUR OR CASTE, IN EDUCATIONAL INSTITUTIONS BELONGING TO OR SUBSIDIZED BY FEDERAL OR STATE GOVERNMENTS

Article VII: Section (1): In educational institutions either belonging to the Federal government, or belonging to private individuals or corporations but receiving subsidies from the Federal government, every citizen of the Federation of India shall, subject to any conditions and limitations prescribed for their governance either by Federal law or by the authorities having control over such institutions and applicable alike to all such citizens without distinction of religion, race, colour, caste, or community, have equality of rights.

Section (2): In educational institutions either belonging to a State government or belonging to private individuals or corporations but receiving subsidies from the State government, every citizen of that State shall, subject to any conditions and limitations prescribed for their governance either by State law or by the authorities having control over such institutions and applicable alike to all such citizens without distinction of religion, race, colour, caste or community, have equality of rights.

Section (3): The Federal legislature shall have power to enforce by appropriate legislation the provisions of this article.

Scope of the article explained. This is a new Article drafted by me with the definite object of preventing any discrimination being made on the basis of religion, race, colour, caste or community, in educational institutions belonging to the Federal or State governments or belonging to private individuals or corporations but receiving subsidies from such governments.

It is necessary to call attention to the following points in connexion with the provisions of this Article; (1) Sections 1 and 2 do not preclude the making of general laws, rules and regulations, for the governance of the institutions referred to in those sections. But what they insist on is, that conditions and

limitations prescribed by Federal or State laws or by the authorities themselves having control over those institutions shall be of general application to all citizens, without distinction of religion, race, colour, caste or community. The sections seek to prevent any kind of discrimination being made in the enjoyment of the facilities offered by such educational institutions, solely on the ground of the religion, race, colour, caste or community of a citizen. (2) As the facilities of every educational institution answering to the requirements of sections 1 and 2 are thrown open, subject to rules of general application, to all citizens without any distinction of religion, race, colour, caste or community, there can be no compulsory segregation of persons based upon communal or racial considerations. This is a feature to be welcomed, because, there should not only be equality in the enjoyment of the facilities afforded by educational institutions as between one citizen and another, but there should also not be any compulsory segregation of persons in such institutions. We have noticed already, that the equal protection of the laws clause in the Fourteenth Amendment to the United States Constitution has been interpreted to guarantee only equality of facilities as between negroes and whites and not social equality and that there is nothing to prevent segregation of the two races in separate educational institutions, if only the facilities offered by both are of equal quality. The provision suggested by me will prevent any such segregation being practised in educational institutions. (3) The equal protection of the laws clause embodied in section 5, Article VI, of the draft provision, is only a restraint upon the powers of the States. It prohibits State laws, or acts done under State authority, from infringing the constitutional requirement of equal protection of the laws. This clause does not bind the Federal government. Nor has it any effect upon individual action. The provisions contained in sections 1 and 2 as drafted by me now cover the two latter cases also. Section 1 is a check not only upon the powers of the Federal government but also upon individual action discriminating between citizen and citizen. (4) It will be noticed that so far as educational institutions belonging to any particular State or belonging to private

individuals or corporations but subsidized by that State are concerned, it is only the citizens of that State that are placed by section 2 on a footing of perfect equality. Citizens of other States have not been given any such privileged position. It is only right that in the enjoyment of the facilities offered by educational institutions established or subsidized by a State, the citizens of that State should have first preference. The provision made by section 2 of this article is aimed at preventing discrimination being made in such institutions solely on the ground of religion, race, colour, caste or community among the citizens of that State itself. A safeguard of this kind would prevent persons in authority from denying or curtailing the facilities of educational institutions to the members of any religion, race, colour, caste or community, based solely upon such considerations. As Chief Justice Hughes has said in *Missouri ex. Rel. Gaines* v *Canda,*[121] it is the duty of the State when it provides educational facility of a particular type, 'to furnish it to the residents of the State upon the basis of an equality of right' and not create a privilege for one class (white) of students which is denied to another class (negro) of students, although the latter had the same qualifications as the former. (5) In educational institutions belonging to the Federal government or belonging to private individuals or corporations but subsidized by the Federal government, it is only right that all citizens of the Federation of India, subject to limitations and conditions applicable alike to every such citizen, and without any discrimination being made on grounds of religion, race, colour, caste or community, should have equality of rights. (6) The third section of this article empowers the Federal legislature to pass appropriate legislation to enforce the provisions of sections 1 and 2.

121. (1939) 305 U.S. 337, 349.

IX

PROVISION FOR ASSURING EQUAL FACILITIES TO ALL PERSONS WITHOUT DISTINCTION OF RELIGION, RACE, COLOUR OR CASTE, IN HOTELS, PUBLIC TRANSPORTS, THEATRES, WELLS AND PUBLIC STREETS

Article VIII: Section (1): All persons within the jurisdiction of the Federation of India shall, in the matter of enjoyment of the accommodations, advantages, facilities and privileges of hotels, public transports employed on land, water or air, theatres and other places of public amusement, public wells and public streets, subject only to the conditions and limitations prescribed by competent Federal or State law and applicable alike to persons of every religion, race, colour, caste or community, be entitled to full and equal facilities.

Section (2): The Federal legislature shall have power by appropriate legislation to enforce the provisions of this article.

General. Section 1 of this Article is largely based upon Section 1 of the Congressional Act of 1 March 1875, entitled 'An Act to protect citizens in their civil and legal rights' and generally known as The Civil Rights Act. That section runs as follows: 'That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and colour, regardless of any previous condition of servitude'. Section 2 of the Act provides for penalties in the event of the violation of section 1 by denying to any citizen except for reasons by law applicable to citizens of every race and colour, the full enjoyment of the facilities of inns, etc.

Civil Rights Cases. In the famous *Civil Rights Cases*[122] the constitutional validity of these sections was considered.

122. (1883) 109 U.S. 3.

Prosecutions had been launched against some individuals and a railway company under the first and second sections of the Civil Rights Act aforesaid, the offences alleged being the denial to coloured persons, on account of their colour, of accommodation at a hotel, admission to a theatre and entrance to a ladies' car on a railway. The case ultimately reached the Supreme Court. These sections had been enacted by Congress in pursuance of the authority given by section 5 of the Fourteenth Amendment to the Constitution to enforce the provisions of that amendment. Mr. Justice Bradley who delivered the opinion of the Court held that sections 1 and 2 of the Civil Rights Act were void, and that those sections could not be rested upon the Fourteenth Amendment for three principal reasons: (1) The Fourteenth Amendment prohibited only State action of the character mentioned therein and not individual invasion of individual rights. (2) The fifth section of the Fourteenth Amendment conferred only authority upon Congress to prescribe modes of relief against State action or State legislation prohibited by the amendment and did not invest Congress with power to enact a code of municipal law for the regulation of municipal rights. (3) As the prohibitions of the Fourteenth Amendment were laid only upon State laws and acts done under State authority, no legislation passed by Congress under the amendment, nor any proceeding under such legislation, could be called into activity until some State law had been passed or some State action had been taken through its officers or agents adverse to the rights of the citizens safeguarded by the Fourteenth Amendment.

Mr. Justice Bradley in his opinion for the Supreme Court in that case observed:

It [the Fourteenth Amendment] declares that: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void

all State legisation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen,* the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect: and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect......An apt illustration of this distinction may be found in some of the provisions of the original Constitution. Take the subject of contracts, for example: The Constitution prohibited the States from passing any law impairing the obligation of contracts. This did not give to Congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give the power to provide remedies by which the impairment of contracts by State legislation might be counteracted and corrected: and this power was exercised. The remedy which Congress actually provided was that contained in the 25th Section of the Judiciary Act of 1789, 1 Stat. 85, giving to the Supreme Court of the United States jurisdiction by writ of error to review the final decisions of State courts whenever they should sustain the validity of a State statute or authority alleged to be repugnant to the Constitution or laws of the United States...... And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment nor any proceeding under such legislation, can be called into activity:

for the prohibitions of the amendment are against State laws and acts done under State authority. Of course, legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, State laws, or State action of some kind adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication.

Scope of the provision. Section 1 of the draft Article is intended to provide that all persons—whether they are citizens of the Federation of India or not—irrespective of their religion, colour, race, community or caste, should, in the matter of the enjoyment of the facilities of hotels, railways, streets, etc., be treated alike. It will be noticed that the provision does not bar the enactment of appropriate legislation by the Federation or a State having jurisdiction over the subject-matter, regulating the enjoyment of the facilities offered, so long as such legislation does not discriminate between man and man on the basis of his religion, race, colour, caste or community.

A clear provision of this type is necessary to prevent discriminatory treatment in regard to the enjoyment of the facilities offered by hotels, public transports, etc. Moreover, an express provision of this kind embodied in the Constitution will prevent the technical difficulties which have been encountered in the United States in connexion with Congressional legislation based upon the Fourteenth Amendment passed with similar objects in view.

The second section of this article is intended to arm the Federal legislature with power to enforce the provisions of section 1 by appropriate legislation. The Federal legislature may, for instance, make it an offence punishable with fine or imprisonment or both, to deny or abet the denial to any person, except for reasons by law applicable to persons of every religion, race, colour, caste or community, the full enjoyment of the facilities of public transports, public wells or public streets.

X

PROVISION PROHIBITING DISCRIMINATIONS BASED UPON RELIGION, COLOUR, PLACE OF BIRTH OR DESCENT IN REGARD TO THE HOLDING AND DISPOSAL OF PROPERTY, THE PURSUIT OF ANY OCCUPATION OR BUSINESS ETC.

Article IX: Section (1) : No citizen of the Federation of India shall on grounds only of religion, caste, community, place of birth, descent, colour or any of them be ineligible for office under the Federal government, or be prohibited on any such ground from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession anywhere within the limits of the Federation of India.

Section (2) : No citizen of a State shall on grounds only of religion, caste, community, place of birth, descent, colour or any of them be ineligible for office under the State of which he happens to be a citizen.

Section (3) : Nothing in section 1 of this Article shall affect the provisions of the Punjab Land Alienation Act, 1900, as in force on the date the Federal Constitution of India comes into effect.

General. This article is based upon section 298 of the Government of India Act, 1935. The authors of the Act considered it desirable to incorporate a provision declaring that a person should not be disabled from holding public office or from acquiring, holding or disposing of property, or from practising any trade, business or profession, solely by reason of his religion, descent, caste, colour or place of birth.

Holding of properties. Section 298 of the Government of India Act, 1935 contains a provision incorporated in subsection (2) of that section which runs as follows: 'Nothing in this section shall affect the operation of any law which prohibits, either absolutely or subject to exceptions, the sale or mortgage of agricultural land situate in any particular area, and owned by a person belonging to some class recognized by the law as being a class of persons engaged in or connected with agriculture in that area, to any person not belonging to any such class.' This proviso clause, if allowed to stand in its present

form, may be used to prevent, permanently, members of certain castes and communities, from acquiring agricultural land within a particular area, on the ground that they do not belong to some class recognized by the law as being a class of persons engaged in or connected with agriculture. A constitutional provision which permits discriminatory treatment of this type to be practised against persons in regard to the acquiring of agricultural land on the mere ground that they do not belong to a privileged tribe or caste cannot with any justification be allowed to stand. In justification of this proviso clause, it has been argued that it is intended to 'cover legislation such as the Punjab Land alienation Act, which is designed to protect the cultivator against the money-lender.'[123] One may well doubt the wisdom of a piece of legislation which seeks to limit the class of people who could purchase agricultural land in any area to a particular class of individuals only, as a seller would thereby be prevented from realizing a fair price for his property when he cannot sell in the competition of a free market. Legislation designed to protect the cultivator against the money-lender might more appropriately take the form of control of the rate of interest, extention of the time of foreclosures and the vesting of power in courts to grant permission to the debtor to pay the debts in convenient annual instalments. But it may be argued that the legislatures must have their hands free even to provide by legislation that lands belonging to agriculturists in certain special areas should be sold or mortgaged only to agriculturists and not to persons whose avocation is not agriculture. One may grant this premise. Even so, that object could be secured by finding a suitable definition of the term agriculturist based not upon birth in a particular tribe or community or caste but upon the occupation followed. The proviso clause, if allowed to stand in its broad form, can be easily abused by legislatures to prevent lands being acquired by persons belonging to certain castes or communities. I am, therefore, deleting this proviso clause from my draft article.

123. *Report of the Joint Committee on Indian Constitutional Reform*, vol. 1, p. 217.

An exception in the case of the Punjab Land Alienation Act, 1900. Although a proviso clause such as the one embodied in subsection (2) of Section 298 of the Government of India Act, 1935, is not included in my draft article, I have thought it expedient to make a reservation in favour of the Punjab Land Alienation Act, 1900, which is a rather old piece of legislation and has struck deep roots in the economic life of that province. The omission of the proviso clause from the provision suggested would prevent legislation patterned on the Punjab Land Alienation Act, 1900, being attempted in other parts of India. I may also say that the Punjab Act has been subjected to a great deal of criticism. I may give one such example here. Pandit Nanak Chand, a British Indian Delegate to the third session of the Indian Round Table Conference, in the course of a speech delivered by him at a general discussion, before the proceedings of the Conference were wound up, referred to the Punjab Land Alienation Act in these words:

> I do not wish to enter into the merits and demerits of the Act. What I maintain is—(a) that the Act in its form debars 50 per cent of the population of the Punjab from acquiring property merely because this 50 per cent happens to be born in particular castes. The Depressed Classes and other castes have got a just grievance, that 75 per cent of the Hindus have been so debarred from purchasing property or agricultural land merely because they happen to be born in certain castes. Caste sticks to a person up to death. (b) that it is no protection to the poor proprietor of land who has to part with his property under necessity. He does not get a fair price, as competition is limited. He practically has to sell his land at half the price. (c) that it gives the moneylenders, lawyers and men with money of certain tribes or castes a charter to rob the poor agriculturist. (d) that it is possible to remedy these defects and find suitable definition of the agriculturist based not upon birth or caste but on occupation.[124]

124. *Indian Round Table Conference*: (Third Session): *Sub-Committees' Reports;* Summaries of Discussions, pp. 115-16.

XI

PROVISION FOR SAFEGUARDING PROPERTY RIGHTS

Article X: Section (1): No person shall be deprived of his property anywhere in the Federation of India save by authority of a competent Federal or State law.

Section (2): Neither the Federal nor a State legislature shall have power to make any law authorizing the compulsory acquisition of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless such acquisition is for public purposes and the law provides for the payment of just compensation.

Section (3): In this article 'land' includes immovable property of every kind and any rights in or over such property, and 'undertaking' includes part of an undertaking.

•This article is largely based upon section 299 of the Government of India Act, 1935.

The first section of the article is a safeguard against deprivation of property by executive action unsupported by competent legislative authorization.

Subsection (2) of section 299 of the Government of India Act, 1935, provides that 'neither the Federal nor a provincial legislature shall have power to make any law authorizing the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined.' The latter clause of this subsection gives to the legislatures unrestricted authority to fix the amount of compensation to be paid by the law itself or to specify in the statute the principles upon which the compensation has to be assessed. It is obvious that under the provision as it stands worded in the Government of India Act, 1935, the courts would be powerless to grant relief even though a party might, under the law applicable, get only a

fraction of the real value of the property acquired. It seems to me that the exercise of the power of eminent domain whether by the Federal or a State government should be conditioned upon the award of just compensation.

Award of just compensation for property acquired for public purposes. Under the Constitution of the United States, there is sufficient safeguard that the taking of private property for public use should be conditioned upon the payment of just compensation to the owner of the property. So far as the Federal government is concerned, there is an express provision contained in the Fifth Amendment, providing, that private property shall not be taken for public use without just compensation. Although the Constitution of the United States does not contain any express parallel provision corresponding to the clause in the Fifth Amendment, conditioning the exercise of the eminent domain power by the States, the Supreme Court of the United States has interpreted the due process clause of the Fourteenth Amendment affecting property rights as comprehending this guarantee.[125]

Section 51 (XXXI) of the Commonwealth of Australia Constitution Act, 1900, runs thus: 'The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.' The exercise of the eminent domain power by the Commonwealth Parliament is, therefore, conditioned upon the acquisition being made on just terms.

The constitutional requirement that the owner whose property is taken for public use is entitled to just compensation, means that the owner should be put in as good a position pecuniarily as he would have been if his property had not been taken. In *Seaboard Air Line Co.* v *United States*[126] Mr. Justice Butler delivering the opinion of the Court said (pp. 304-306):

Section 10 of the Lever Act authorizes the taking of property for the public use on payment of just compensation. There is no provision

125. *Missouri Pacific Co.* v. *Nebraska* (1896) 164 U.S. 403.
126. (1923) 261 U.S. 299.

in respect of interest. Just compensation is provided for by the Constitution, and the right to it cannot be taken away by statute. Its ascertainment is a judicial function. *Monongahela Nav. Co.* v. *United States,* 148 U.S. 312, 327. The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. *Monongahela Nav. Co.* v. *United States,* supra. It rests on equitable principles, and it means substantially that the owner shall be in as good position pecuniarily as he would have been if his property had not been taken. *United States* v. *Rogers* (C.C.A. 8th C) 168 C.C.A. 437, 257 Fed. 397, 400. He is entitled to the damages inflicted by the taking. *Northern P. R. Co.* v. *North American Teleg. Co.* (C.C.A. 8th C.) L.R.A. 1916 E, 572, 114 C.C.A. 489, 230 Fed. 347, 352, and cases there cited. The United States in effect claims that the owner is entitled to no more than the value of the land, as of date of taking, to be paid at a later time, when ascertained. The owner has been deprived of the land and its use since the taking, 23 May 1919. The value of the property, as ascertained by the President, was $235·80, and this was allowed with interest from date of taking. But, as judicially determined later, the value when taken was $6000. The owner's right does not depend on contract, express or implied. A promise to pay is not necessary. None is alleged. This suit is a part of the authorized procedure initiated by the United States for the condemnation of the land. The owner was not satisfied with the amount fixed by the President. A necessary condition of the taking is the ascertainment and payment of just compensation. *Monongahela Nav. Co.* v. *United States,* 148 U.S. 312, 337; *Searl* v. *School Dist.* 133 U.S. 553, 562; *United States* v. *Jones,* 109 U.S. 513, 518; *United States* v. *Sargent,* 89 C.C.A. 81, 162 Fed. 81, 83......The requirement that 'just compensation' shall be paid is comprehensive, and includes all elements, and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. When the United States condemns and takes possession of land before ascertainment or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value, paid contemporaneously with the taking, Interest at a proper rate is a good measure by which to ascertain the amount so to be added.[127]

Certain drafting difficulties. On first impression, a constitutional rule that no property ought to be taken except upon payment of proper compensation appears to be quite unexceptionable and fair. But a broad proposition to that effect would

127. See also *United States* v. *New River Collieries Co.* (1923) 262 U.S. 341; *Joslin Mfg. Co.* v. *Providence* (1923) 262 U.S. 668.

restrict the powers of the legislature in regard to taxation measures. The Right Hon'ble Sir Thomas Inskip, the Attorney-General, speaking at the Committee stage of the Government of India Bill in the House of Commons gave the following reasons for narrowing the scope of the compensation clause:

Most of us, without prejudice to the hon. members on the front Bench opposite, share the view that no property ought to be taken except upon proper compensation being paid. That, however, is a statement which it is more easy to make than to apply to every conceivable set of facts. For instance, when this House takes a considerable portion of a person's income and a person's estate after his death; it is not easy to apply the principle that no property should be taken except upon proper compensation being paid. The property is taken and compensation is not paid. I only mention that to show how easy it is to make a general statement that property ought not to be taken without compensation and how difficult it may be to apply it to a particular legislative proposal by way of taxation......Let me take the question as to the nature of the property that was to be the subject of this provision. The Joint Select Committee undoubtedly envisaged all property. They used the word 'property'. My hon. Friend has rightly said that the Clause as drawn deals only with land—what in this country we call real property, and, as it includes immovable property, it includes buildings on that land. That clause, in the form in which it is drawn, leaves out what we call personal property, which would include stocks and shares, securities and movables. When we come to a proposal to include movables which are included in personal property, we are up against the difficulty which I mentioned just now, that it is no good legislating in such a way as to make it illegal to impose taxation upon people who have personal property. It is possible to legislate against the State taking immovable property without compensation, but it is practically impossible—I think quite impossible—to devise words which will prevent them taking personal property without compensation unless we do that which is absurd, namely, make it illegal to tax people and even to impose penal taxation, which is the character of a great deal of taxation in this country as anyone familiar with the Income Tax laws will agree. Therefore, we have to put in rather more limited words if we are to extend the Clause so as to make it cover something else than immovable property, that is, land. I am prepared to consider on behalf of Government putting in some additional words. I cannot go as far as my hon. Friend proposes when he would put in personal property *simpliciter*, but I can go as far as to say that I will gladly consider whether some such words as these cannot be put in after the word 'land' in line 34—'or any industrial or commercial undertaking.' ......They are words which, I think, may properly go in, and I will take care that words to that effect are added. The word to which I

should personally attach a great deal of importance is 'undertaking,' because it refers to something which is identifiable, and it does not run up against the difficulty that I have mentioned of taking money or personal property except by taxation. For instance, it would cover, I think, a proposal to take a fleet of steamboats, an undertaking which somebody was carrying on in the way of commerce or industry. That is as far as I feel able to go in connexion with that objection.[128]

The reasons given by Sir Thomas Inskip for limiting the scope of the compensation clause appear to my mind to be convincing. I have, therefore, retained in my draft article the very words which occur in subsection (2)) of Section 299, viz., ' any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking.'

XII

PROVISION AGAINST QUARTERING OF TROOPS IN PRIVATE HOUSES DURING PEACE-TIME

Article XI: No soldier shall, in time of peace, be quartered in any house without the consent of the owner, and in time of war, except in a manner to be prescribed by law.

The object of this provision, which is based upon the Third Amendment to the Constitution of the United States, is, to preserve the security and privacy of private dwellings. In time of peace, the quartering of troops in private dwellings, except with the consent of their owners, is prohibited by this article. And even during a time of war, such quartering of troops must conform to the conditions prescribed by law in regard to that matter.

XIII

PROVISION WITH RESPECT TO THE ISSUE OF WRITS OF HABEAS CORPUS BY FEDERAL COURTS, BRITISH INDIAN HIGH COURTS, AND THE HIGHEST APPELLATE COURTS IN INDIAN STATES

Article XII: Section (1): The Federal Legislature shall have power, in the Federal sphere, to prescribe by law

128. *Official Report: Parliamentary Debates, House of Commons*, 9 April 1935, vol. 300, cols. 1076-78.

the jurisdiction and powers of the Federal Court of India, other Federal courts, and the judges thereof, to issue writs of habeas corpus and the procedure to be followed in regard to such habeas corpus proceedings.

Section (2): The powers conferred upon the various British Indian High Courts by section 491 of the British Indian Code of Criminal Procedure, 1898, as in force on 1 January 1946, to issue directions of the nature of a habeas corpus, shall not be curtailed but may be enlarged.

Section (3) : If any Indian State, which has entered the Federation of India as a constituent unit of the Federation, has either not made provision by its laws empowering the highest appellate court in its territory to issue writs of habeas corpus or has made provision by its laws empowering such courts to issue such writs, but the powers so conferred fall short of the powers conferred on a British Indian High Court by section 491 of the British Indian Code of Criminal Procedure, 1898, as in force on 1 January 1946, then such appellate court shall have and be competent to exercise, all or any of the powers which a British Indian High Court has and exercises under section 491 of the British Indian Code of Criminal Procedure, 1898, as in force on 1 January 1946; but nothing hereinbefore contained shall be deemed to prevent any Indian State which has entered the Federation of India from legislating, subsequent to its entry, to confer by its own laws, powers on the highest appellate court in the State, to issue directions of the nature of a habeas corpus, which are as wide as or wider than those conferred upon a British Indian High Court by section 491 of the British Indian Code of Criminal Procedure, 1898, as in force on 1 January 1946.

Section (4): The privilege of the writ of habeas corpus shall not be suspended by the Federation or a British Indian Province or an Indian State, except in cases of rebellion or invasion when the public safety may require such suspension.

Section (5): Where a group of Indian States have joined together to establish a common High Court having jurisdic-

tion over them all, then such court shall, for purposes of section 3 of this Article, be deemed to be the highest appellate court for each one of the States in the group, although the court may be located in any one of these States or located in a place outside the territories of this group.

The writ of habeas corpus—General observations. The procedural writ of habeas corpus is the most valuable safeguard known to the English law to safeguard the liberty of the subject. The origin of this writ is lost in immemorial antiquity. At common law there were old writs like the writ of Mainprize and *De Odio et atia,* which were designed to secure the liberty of the individual under certain circumstances. There were also several writs of habeas corpus like *habeas corpus ad respondendum, habeas corpus ad satisfaciendum,* and *habeas corpus ad subjiciendum.* The writ *habeas corpus ad subjiciendum* which was a writ directed to the person who had the prisoner in custody, commanding such person to produce the body of the prisoner in court with the date and cause of detention, and submit to whatsoever order the court might pass, was the most important of such writs. It was this common law writ that was later improved upon and strengthened by the habeas corpus acts into an efficient instrument for securing the liberty of a subject who had been illegally detained.

Before the enactment of the famous Habeas Corpus Act, 1679 (31 Car. II, Chap. 2), the writ of habeas corpus proved in many circumstances to be of little use to protect the liberty of the subject. There were various ways in which the writ could be defeated as for example the removal of the prisoner out of England or by the change of the place of detention. Doubt had also been entertained whether the writ could be issued by the Court of Common Pleas or by the Court of Exchequer, and whether a single judge could issue it during vacation. In view of the procedural difficulties and uncertainties, the liberty of the subject was in great peril. Bills with the object of making the writ effective had been introduced into the House of Commons in 1668, 1670, 1673 and 1675; but it was not until the year 1679, that this attempt

bore fruit in the passage of the famous Habeas Corpus Act, 1679.[129]

The Habeas Corpus Act, 1816 (56 Geo. III, Chap. 100) makes the writ available in cases of civil detentions.

The writ is issued by the High Court in England whenever a complaint is made to it, based upon satisfactory grounds, that anybody whether an Englishman or a foreigner, is alleged to be wrongfully deprived of his liberty. And if the court is satisfied upon inquiry that there is no legal justification for the detention, the court will direct that the person detained be set at liberty. This writ can be invoked in a wide variety of circumstances. A few examples of the circumstances under which the writ has been invoked are given hereafter. A foreigner whose extradition has been applied for and committed by a magistrate for extradition may apply for a writ of habeas corpus contending that his extradition under the terms of the treaty is illegal, as for example, that the crime with which he is charged is a political one and hence not extraditable, *Castioni, in re:*[130] a woman who is being detained by her husband against her consent can ask for the writ to be set free, *Queen v Jackson;*[131] and a person who is sought to be illegally deported out of England, may sue out a writ for securing his liberty, *Secretary of State* v *O'Brien.*[132]

The great merit of the procedural writ of habeas corpus is the swift and imperative remedy available in all cases of illegal restraint or confinement. Speaking of the great importance of the writ of habeas corpus subjiciendum in the scheme of English law, as a procedural safeguard for the liberty of the individual, the Earl of Birkenhead, as Lord Chancellor, in *Secretary of State* v *O'Brien*[133] said (p. 609)

> We are dealing with a writ antecedent to statute, and throwing its root deep into the genius of our common law. The writ with which

129. F. W. Maitland and F. C. Montague, *A sketch of English Legal History* (1915), p. 143.
130. (1891) 1 Q.B. 149.
131. (1891) 1 Q.B. 671.
132. (1923) A.C. 603.
133. (1923) A.C. 603.

we are concerned today was more fully known as habeas corpus ad subjiciendum. This writ, however, was one of many. Thus there was a writ of ad respondendum, ad satisfaciendum, ad prosequendum, ad testificandum, and ad deliberandum. All these writs exhibited many features in common; but the most characteristic element of all was their peremptoriness. Today the substitution of more modern remedies has left the writ ad subjiciendum, more shortly known as the writ of habeas corpus, in almost exclusive possession of the field. It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by courts of law as a check upon the illegal usurpation of power by the Executive at the cost of the liege.

The only provision in the Constitution of the United States relating to habeas corpus is that to be found in Article I Section 9 clause 2 which provides: 'The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.' The United States Constitution assumes that the writ of habeas corpus will be part of the law of the land and only provides against its suspension except when there is a rebellion or invasion. So far as the States who form the constituent units of the Federal union are concerned, the power and authority of the various State courts and judges to issue writs of habeas corpus are regulated by constitutional and statutory provisions.[134] Though there is no express grant of power in favour of Congress under the Constitution authorizing it to confer authority upon the various Federal courts to issue writs of habeas corpus, that power has been regarded as implicit and Congress has regulated by statute the jurisdiction and powers of the Federal courts to issue habeas corpus writs.

Jurisdiction of Federal courts and their judges to issue habeas corpus writs in United States. The statutory provision defining the jurisdiction of the Federal courts to issue writs of habeas corpus limits it to the Federal sphere. That provision (28 U.S.C. Section 453) provides:

134. *Corpus Juris,* vol. 29, p. 119.

The writ of habeas corpus shall in no case extend to a prisoner in jail unless he is in custody under or by colour or the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under colour thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify.

The Supreme Court of the United States, the various Federal District Courts, the several justices of the Supreme Court and the several judges of the Circuit Courts of Appeal and of the District Courts, within their respective jurisdictions have been empowered to issue writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. (28 U.S.C. sections 451 and 452).

An outline of the procedure followed in issuing habeas corpus writs by Federal courts in the United States. An idea of the procedure sanctioned by Federal statutes in habeas corpus proceedings prosecuted in Federal courts can be gained from a perusal of the following extract from the opinion of the court delivered by Mr. Justice Roberts in *Walker* v *Johnston*[135] which runs thus (pp. 283-284):

The statutes of the United States declare that the Supreme Court and the district courts shall have power to issue writs of *habeas corpus* (R.S. 751, 28 U.S.C. 451); that application for the writ shall be made to the court or justice or judge authorized to issue the same by complaint in writing, under oath, signed by the petitioner, setting forth the facts concerning his detention, in whose custody he is and by virtue of what claim or authority, if known. (R.S. 754, 28 U.S.C. 454). The court or justice or judge 'shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto.' The writ shall be directed to the person in whose custody the petitioner is detained. (R.S. 755, 28 U.S.C. 455). The person to whom the writ is directed must certify to the court or judge the true cause

135. (1941) 312 U.S. 275.

of detention and, at the same time, he makes his return, bring the body of the party before the judge who granted the writ. (R.S. 757, 28 U.S.C. 457; R.S. 758, 28 U.S.C. 458) When the writ is returned a day is to be set for the hearing, not exceeding five days thereafter, unless the petitioner requests a longer time. (R.S. 759, 28 U.S.C. 459). The petitioner may deny the facts set forth in the return or may allege any other material facts, under oath. (R.S. 760, 28 U.S.C. 460). The court or judge 'shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.' (R.S. 761, 28 U.S.C. 461). It will be observed that if, upon the face of the petition, it appears that the party is not entitled to the writ, the court may refuse to issue it. Since the allegations of such petitions are often inconclusive, the practice has grown up of issuing an order to show cause, which the respondent may answer. By this procedure the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grant of the writ with consequent production of the prisoner and of witnesses may be avoided where from undisputed facts or from incontrovertible facts, such as those recited in a court record, it appears, as matter of law, no cause for granting the writ exists. On the other hand, on the facts admitted, it may appear that, as a matter of law, the prisoner is entitled to the writ and to a discharge. This practice has long been followed by this court, (*Ex parte yarbrough,* 110 U.S. 651, 653; *Mooney* v. *Holohan,* 294 U.S. 103, 111), and by the lower courts, (*Murdock* v. *Pollock,* 229 F. 392). It is a convenient one, deprives the petitioner of no substantial right, if the petition and traverse are treated, as we think they should be, as together constituting the application for the writ, and the return to the rule as setting up the facts thought to warrant its denial, and if issues of fact emerging from the pleadings are tried as required by the statute.

It has been held that Congress has the authority to liberalize the common law procedure on habeas corpus and may for instance provide for a judicial inquiry into the very truth and substance of the causes of a person's detention, *Johnson* v *Zerbst.*[136]

Express provision conferring power on the Indian Federal legislature to provide for the issue of habeas corpus writs by Federal courts recommended. The draft article proposed by me for incorporation into the future constitution of India con-

136. (1938) 304 U.S. 458, pp. 466-467.

sists of five sections, of which the first three and the fifth are entirely new provisions drafted by me. I shall mention in the paragraphs that follow the reasons upon which I am suggesting their incorporation into the new Indian Constitution. The fourth section of this article is based upon a parallel provision found in Article I, Section 9, clause 2 of the Constitution of the United States.

The first section of this article gives specific power to the Indian Federal legislature in the Federal sphere to prescribe by law the jurisdiction and powers of the Federal Court of India, the other Federal Courts and the judges thereof to issue writs of habeas corpus. As I have already mentioned, the Constitution of the United States does not contain any specific provision empowering the Congress of the United States to legislate to confer authority on Federal courts to grant writs of habeas corpus. But that power has been regarded as implied. It seems to me that a matter of this importance should not be left in any doubt, and that a specific provision granting the requisite authority to the Federal legislature to confer power upon the Federal courts and the judges thereof to issue writs of habeas corpus should be written into the Constitution.

Present powers of British Indian High Courts to issue writs of habeas corpus not to be abridged but may be enlarged. The second section of this article by which the powers now exercised by the British Indian High Courts to issue directions of the nature of writs of habeas corpus are not to be curtailed, though they might be enlarged, has been put in in order to prevent any future legislative contraction of the existing powers of the British Indian High Courts. It is necessary to point out, that the powers now vested in all the British Indian High Courts to issue writs of habeas corpus in respect of all persons within the limits of their respective appellate criminal jurisdictions are of comparatively recent origin. They date in fact from the time of the enactment of the Criminal Law Amendment Act XII of 1923, by which section 491 of the British Indian Criminal Procedure Code was amended to assume its present shape. Prior to this amend-

ment of 1923, the powers of the British Indian High Courts to issue writs of habeas corpus were restricted and were to this effect: (1) Any High Court could pass an order of the nature of habeas corpus with reference to a European British subject within the local limits of its appellate criminal jurisdiction, and such other territories as the Governor-General in Council may direct. (vide ss. 456 and 458 now repealed and absorbed in s. 491 and new section 491-A), (2) the High Courts in the Presidency towns could pass orders of the nature of habeas corpus in respect of all persons within the limits of its ordinary original civil jurisdiction. The amendment of 1923 widened the jurisdiction of all the High Courts in regard to the exercise of such powers. Under section 491 of the Code of Criminal procedure as amended by the 1923 Act aforesaid, *any* High Court can issue writs of the nature of Habeas Corpus in respect of *all* persons within the local limits of its *appellate criminal jurisdiction.*[137]

Section 491 of the British Indian Criminal Procedure Code, 1898, as in force at present, runs as follows:

491. (1) Any High Court may, whenever it thinks fit, direct—

(a) that a person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law;

(b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty;

(c) that a prisoner detained in any jail situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such court;

137. The Privy Council in *Matthen* v. *District Magistrate, Trivandrum,* I.L.R. [1939] Madras 744, have ruled, that the power to issue the common law writ of habeas corpus which the High Courts in the Presidency towns had as successors of the Supreme Courts, had been taken away by Acts of the Indian Legislature in regard to matters contemplated by Section 491 of the Criminal Procedure Code, 1898.

(d) that a prisoner detained as aforesaid be brought before a Court-martial or any Commissioners for trial or to be examined touching any matter pending before such Court-martial or Commissioners respectively;

(e) that a prisoner within such limits be removed from one custody to another for the purpose of trial; and

(f) that the body of a defendant within such limits be brought in on the Sheriff's return of *cepi corpus* to a writ of attachment.

(2) The High Court may, from time to time, frame rules to regulate the procedure in cases under this section.

(3) Nothing in this section applies to persons detained under the Bengal State Prisoners Regulation, 1818, Madras Regulation II of 1819, or Bombay Regulation XXV of 1827, or the State Prisoners Act, 1850, or the State Prisoners Act, 1858.

Provision for the issue of habeas corpus writs by the highest appellate courts in Indian States. The third section of the draft article deals with the issue of writs of habeas corpus by courts in the Indian States. I know some important States who have made no provision for the highest courts in their territories issuing writs of habeas corpus. Although the provisions contained in their Codes of Criminal Procedure are almost wholly based upon the provisions contained in the British Indian Code of Criminal Procedure, they have dropped out the habeas corpus provision contained in section 491 of the British Indian Code. I believe this observation is applicable to most Indian States. It seems to me that any new Constitution devised for India should see to it that the highest court in every constituent unit of the Federation—be it an Indian Province or an Indian State—should have the authority to issue writs of habeas corpus, a writ which is the most precious procedural safeguard which the wit of man has devised to safeguard the personal liberty of the individual. The third

section of the draft article provides, that if any Indian State which has joined the Federation has either made no provision by its laws for its highest appellate court to issue writs of habeas corpus, or has made provision by its laws empowering such courts to issue such writs, but the powers conferred fall short of the powers conferred upon a British Indian High Court by section 491 of the British Indian Code of Criminal Procedure, then that court shall have and exercise all or any of the powers which a British Indian High Court has and exercises under section 491 of the British Indian Code of Criminal Procedure. I have, however, added a saving clause providing, that an Indian State which has entered the Federation is not precluded, subsequent to its entry, to confer by its own laws on the highest appellate court in its territory, powers to issue writs of habeas corpus which are as wide as or wider than those conferred upon a British Indian High Court by section 491 of the British Indian Code of Criminal Procedure. Such a clause would keep the hands of the Indian States free for making experiments in this important field as they would then be competent to give powers to their own High Courts which are wider than those given to a British Indian High Court.

XIV

In an appendix to this book I have brought together all the provisions which I have suggested in this chapter as suitable for incorporation in a Bill of Rights for New India.

APPENDIX

Draft of the Bill of Rights Suggested for New India in Chapter IV

Article I: Neither the Federation nor a State shall make any law unreasonably abridging freedom of speech or of the press, or the right of the people peaceably to assemble for any reasonable purpose.

Article II: Neither the Federation nor a State shall interfere with the Free profession and practice of any religion by an individual so long as his actions are not incompatible with public order or morality.

Article III: In all criminal prosecutions, whether for a Federal or a State offence, the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation against him, to have compulsory process to secure the attendance of witnesses in his behalf, and to have the assistance of counsel for his defence.

Article IV: Neither the Federation nor a State shall pass any bill of attainder or *ex post facto* criminal law, or inflict cruel or unusual punishments, or subject any person to be put in jeopardy of life or limb twice for the same offence.

Article V: The Federation shall not deprive any person of his life or liberty without due process of law: but, no Federal law shall be open to challenge in a court of law as depriving a person of his liberty without due process of law, on the ground that it interferes with his freedom of contract.

Article VI: Section (1): The Federal legislature shall define by law, who shall constitute citizens of the Federation of India, natural-born and naturalized.

Section (2): A citizen of the Federation of India, who has his domicile in a State of the Federal Union, is a citizen of that State.

Section (3): No State shall make or enforce any law which shall abridge the privileges or immunities of a citizen of the Federation of India, which appertain to him as such citizen.

Section (4): No State shall deprive any person of his life or liberty without due process of law: but, no law of a

State shall be open to challenge in a court of law as depriving a person of his liberty without due process of law, on the ground that it interferes with his freedom of contract.

Section (5) : No State shall deny to any person within its jurisdiction the equal protection of the laws: but, no taxing law of a State shall be open to challenge in a court of law, on the ground that it constitutes a deprivation of the equal protection of the laws.

Section (6) : The Federal legislature shall have power to enforce by appropriate legislation the provisions of this article.

Article VII: Section (1) : In educational institutions either belonging to the Federal government, or belonging to private individuals or corporations but receiving subsidies from the Federal government, every citizen of the Federation of India shall, subject to any conditions and limitations prescribed for their governance either by federal law or by the authorities having control over such institutions and applicable alike to all such citizens without distinction of religion, race, colour, caste or community, have equality of rights.

Section (2) : In educational institutions either belonging to a State government or belonging to private individuals or corporations but receiving subsidies from the State government, every citizen of that State shall, subject to any conditions and limitations prescribed for their governance either by State law or by the authorities having control over such institutions and applicable alike to all such citizens without distinction of religion, race, colour, caste or community, have equality of rights.

Section (3) : The Federal legislature shall have power to enforce by appropriate legislation the provisions of this article.

Article VIII: Section (1) : All persons within the jurisdiction of the Federation of India shall, in the matter of enjoyment of the accommodations, advantages, facilities and privileges, of hotels, public transports employed on land, water or air, theatres and other places of public amusement, public wells and public streets, subject only to the conditions

and limitations prescribed by competent Federal or State law and applicable alike to persons of every religion, race, colour, caste or community, be entitled to full and equal facilities.

Section (2) : The Federal legislature shall have power by appropriate legislation to enforce the provisions of this article.

Article IX : Section (1) : No citizen of the Federation of India shall on grounds only of religion, caste, community, place of birth, descent, colour or any of them be ineligible for office under the Federal government, or be prohibited on any such ground from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession anywhere within the limits of the Federation of India.

Section (2) : No citizen of a State shall on grounds only of religion, caste, community, place of birth, descent, colour or any of them be ineligible for office under the State of which he happens to be a citizen.

Section (3) : Nothing in Section 1 of this Article shall affect the provisions of the Punjab Land Alienation Act, 1900, as in force on the date the Federal Constitution of India comes into effect.

Article X : Section (1) : No person shall be deprived of his property anywhere in the Federation of India save by authority of a competent Federal or State law.

Section (2) : Neither the Federal nor a State legislature shall have power to make any law authorizing the compulsory acquisition of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless such acquisition is for public purposes and the law provides for the payment of just compensation.

Section (3) : In this article 'land' includes immovable property of every kind and any rights in or over such property, and 'undertaking' includes part of an undertaking.

Article XI : No soldier shall, in time of peace, be quartered in any house without the consent of the owner, and in time of war, except in a manner to be prescribed by law.

Article XII : Section (1) : The Federal legislature shall have power, in the Federal sphere, to prescribe by law

the jurisdiction and powers of the Federal Court of India, other Federal courts, and the judges thereof, to issue writs of habeas corpus and the procedure to be followed in regard to such habeas corpus proceedings.

Section (2) : The powers conferred upon the various British Indian High Courts by Section 491 of the British Indian Code of Criminal Procedure, 1898, as in force on 1 January 1946, to issue directions of the nature of a habeas corpus, shall not be curtailed but may be enlarged.

Section (3) : If any Indian State, which has entered the Federation of India as a constituent unit of the Federation, has either not made provision by its laws empowering the highest appellate court in its territory to issue writs of habeas corpus, or has made provision by its laws empowering such courts to issue such writs, but the powers so conferred fall short of the powers conferred on a British Indian High Court by Section 491 of the British Indian Code of Criminal Procedure, 1898, as in force on 1 January 1946, then such appellate court shall have and be competent to exercise, all or any of the powers which a British Indian High Court has and exercises under Section 491 of the British Indian Code of Criminal Procedure, 1898, as in force on 1 January 1946: but nothing herein-before contained shall be deemed to prevent any Indian State which has entered the Federation of India from legislating, subsequent to its entry, to confer by its own laws, powers on the highest appellate court in the State, to issue directions of the nature of a habeas corpus, which are as wide as or wider than those conferred upon a British Indian High Court by Section 491 of the British Indian Code of Criminal Procedure, 1898, as in force on 1 January 1946.

Section (4) : The privilege of the writ of habeas corpus shall not be suspended by the Federation or a British Indian Province or an Indian State, except in cases of rebellion or invasion when the public safety may require such suspension.

Section (5) : Where a group of Indian States have joined together to establish a common High Court having jurisdiction over them all, then such court shall, for purposes of Section 3 of this Article, be deemed to be the highest

appellate court for each one of the States in the group, although the court may be located in any one of these States or located in a place outside the territories of this group.

Explanatory Provision

In Articles I to IV and VI to X of the Bill of Rights the expression 'State' stands for a constituent unit of the Indian Federation, whether it is a British Indian Province or an Indian State.

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